2004

State of Utah v. Becky Lynne Draper : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
BECKY LYNNE DRAPER,	:	Case No. 20040879-CA
Defendant/Appellant.	:	

BRIEF OF APPELLANT

Appeal from an interlocutory order entered in a criminal case in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Terry L. Christiansen, Judge, presiding. Appellant is not incarcerated.

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TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page

CASES

Page

Page

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Respondent,	:	
v.	:	
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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(d) (2002). The Information charges Appellant/Defendant Becky Lynne Draper ("Appellant" or "Ms. Draper") with one count of child endangerment, a third degree felony, in violation of Utah Code Ann. § 76-5-112.5 (2003) (the "child endangerment statute"[1]). R. 01. Ms. Draper timely petitioned this Court for interlocutory review of an order dated October 1, 2004. R. 159-69. See order being appealed from in Addendum A. This Court granted Ms. Draper's request for interlocutory review on the issues set forth below. See this Court's Order granting interlocutory review in Addendum B.

[1] Although Utah Code Ann. § 76-5-112.5 applies to children and elder adults, for the purposes of this brief, Appellant refers to the statute as the child endangerment statute and discusses the statute as it applies to children. Because the statute treats children and elder adults identically, any decision regarding the application of the statute to children would also apply to elder adults.

ISSUES PRESENTED

Issue 1. Whether the child endangerment statute, Utah Code Ann. § 76-5-112.5(2) (2003), is void for vagueness in that it (a) fails to give notice that marijuana and paraphernalia in the basement of a home where an infant resides or nursing a baby at some point after using an unspecified amount of marijuana constitutes child endangerment under the statute, and (b) fails to provide minimal guidelines for enforcement, thereby allowing the crime of child endangerment to be prosecuted in an arbitrary and discriminatory fashion.

Standard of Review. "'Constitutional challenges to statutes present questions of law, which [are reviewed] for correctness.'" State v. Green, 2004 UT 76, ¶42, 99 P.3d 820 (quoting Provo City Corp. v. Thompson, 2004 UT 14, ¶5, 86 P.3d 735) (citations omitted)). Statutes are presumed constitutional and a party challenging the constitutionality of a statute "'bear[s] the burden of demonstrating its unconstitutionality.'" Green, 2004 UT 76, ¶42 (quoting Greenwood v. City of N. Salt Lake, 817 P.2d 816, 819 (Utah 1991)). Moreover, "[t]he constitution tolerates a greater degree of vagueness in civil statutes than in criminal statutes." Green, 2004 UT 76, ¶43 (citing Vill. of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)).

Preservation. This issue was preserved by written motion and argument held at a hearing on September 13, 2004. R. 29-42, 180. The trial court entered a memorandum

decision denying the motion to quash the bindover. R. 159-69; see Addendum A.

Issue 2. Whether the state failed to demonstrate probable cause to believe that Ms. Draper committed child endangerment by knowingly and intentionally allowing her child to ingest or be exposed to marijuana where the state's witness saw Ms. Draper nurse her baby on January 20, 2004 and Ms. Draper told the state's witness that she had used marijuana on New Year's Eve and January 9, 2004 but did not know that marijuana could pass to a baby who nursed.

Standard of Review. The determination of whether to bind a defendant over for trial is a question of law. See State v. Humphrey, 823 P.2d 464, 466 (Utah 1991). Accordingly, [this Court] review[s] that determination without deference to the court below. See id. at 465-66." State v. Clark, 2001 UT 9, ¶8, 20 P.3d 300.

Preservation. This issue was preserved below by written motion and argument at the hearing held on September 13, 2001. R. 29-42; 180. The trial court denied Ms. Draper's motion to quash the bindover based on its conclusion that the state establish probable cause to believe Ms. Draper committed the crime of child endangerment by nursing her child at some point after using marijuana. R. 125.

TEXT OF STATUTE AND CONSTITUTIONAL PROVISION

The text of the following statute and constitutional provision are in Addendum C:

U.S. Const. Amend. XIV;

Utah Code Ann. § 76-5-112.5 (2003).

STATEMENT OF THE CASE

The state charged Ms. Draper with one count of child endangerment, occurring on or about January 9, 2004. R. 1-03. A preliminary hearing was held on May 3, 2004 before the Honorable Stephen L. Roth, acting as a magistrate. R. 44-69. After the evidence was presented, Ms. Draper argued that the Information should be dismissed because the state failed to establish probable cause to bind her over on the charge of child endangerment. R. 62-64. The magistrate concluded that marijuana and paraphernalia found in the basement of the home where Ms. Draper, her husband and another adult resided with Ms. Draper's four-month-old son did not establish probable cause to bind over Ms. Draper on the child endangerment charge; the magistrate bound the case over, however, based on testimony that Ms. Draper admitted using marijuana on two occasions at least 11 days prior to being seen breast feeding her baby. R. 66.

Following bindover, Ms. Draper filed a motion to declare the child endangerment statute unconstitutional and to quash the bindover of that charge. R. 35-49. The trial court held a hearing on September 13, 2004. R. 180. The court filed its written order denying the motion on October 1, 2004. R. 159-69; see Addendum A.

This Court granted Ms. Draper's petition for interlocutory review of the denial of her motion on November 4, 2004. R. 171. Ms. Draper is not in custody.

STATEMENT OF THE FACTS

On January 9, 2004, officers executed a search warrant at Appellant's home.

R. 46. At that time, Ms. Draper shared her home with her husband, Jimmie Elwood Draper, another adult named Jessica Hironas, and the Drapers' four-month-old son, D.D., who was born on September 8, 2003. R. 46, 52, 55, 57.

During the search, officers found individually packaged marijuana, baggies, scales, money, a pay-owe sheet, a couple of bongs, and some pipes in a downstairs room. R. 48. Two bags tested positive for marijuana; one contained 8.7 grams and the other contained 9.9 grams of marijuana. R. 50-51. Those items, all of which were found downstairs, belonged to Jimmie Draper and were sent to the state crime lab with his name on them. R. 49-50, 52. Officers also found money in the bedroom Ms. Draper shared with her husband. R. 49.

After being Mirandized, Ms. Draper acknowledged that her husband had been selling marijuana for 1½ years. R. 49. She also told the officer that her husband left the house to make his sales and nothing was sold out of the house. R. 54.

Ms. Draper and her husband lived in an upstairs bedroom of the house. R. 53. Four-month-old D.D. also had an upstairs bedroom. R. 53.

Karen Barnes, an investigator for the Division of Child and Family Services (DCFS), made an unannounced visit to Ms. Draper's home on January 20, 2004. R. 57. D.D. was present during the interview. R. 57. The purpose of Ms. Barnes' visit was to discuss allegations of child endangerment based on the police finding marijuana in the home. R. 57. Ms. Barnes asked Ms. Draper whether she was using or currently using

marijuana. R. 58. Ms. Draper told her "that she had only used twice since [D.D.] was born. One being New Year's Eve and the other being the day the police were at the home after they left the home." R. 58.

While Ms. Barnes was at the home on January 20th, Ms. Draper started breast feeding D.D. R. 58. Ms. Barnes then talked to Ms. Draper "about the dangers of using and how marijuana and any other drugs go though the breast milk to the child." R. 58. Ms. Draper told the investigator "that she did not know that the marijuana would go though the breast milk to the child," and that she would not use again. R. 60.

Ms. Barnes also told Ms. Draper that marijuana and paraphernalia needed to be out of the home, and Ms. Draper indicated that she thought her husband had removed everything but would follow up on that. R. 58.

The magistrate concluded that marijuana found in the basement did not establish probable cause to believe Ms. Draper committed the crime of child endangerment in this case where the child was four months old, "not mobile and there is no indication that this child was placed in a position where it was placed at risk from any drugs." R. 66. On the other hand, the magistrate concluded that there was enough evidence to bind Ms. Draper over based on the charge of child endangerment for breast feeding her child. R. 66.

In ruling on the motion to declare the statute unconstitutional or quash the bindover, the trial judge considered both the nursing theory and the theory that marijuana

found in the basement exposed the infant to marijuana in deciding that the statute does not violate due process. In ruling on the motion to quash the bindover, however, the judge relied only on the nursing theory and concluded that there was probable cause to believe Ms. Draper committed the crime of child endangerment based on the evidence that she nursed the child. R. 168. The court stated:

> Viewing the facts in the light most favorable to the State and drawing all reasonable inferences in the State's favor, the Court concludes that the State met its burden to bindover to show a reasonable belief that an offense has been committed and that the defendant committed it. As stated above,[ ]the Defendant was nursing her child and was an admitted drug user. A reasonable inference that the Defendant was using drugs prior to nursing her child can be made, therefore, the "ingested" portion of the statute may apply. Although there was testimony that the Defendant did not know that the drugs in her system would pass to her child when nursing, the evidence must be viewed in a light most favorable to the State and all reasonable inferences drawn in the State's favor. The Court concludes that there was enough evidence at the preliminary hearing to show that Defendant knowingly or intentionally caused her child to ingest or be exposed to a controlled substance, chemical substance or drug paraphernalia.

R. 168.

SUMMARY OF THE ARGUMENT

The trial court erred in refusing to conclude that Utah's child endangerment statute is void for vagueness. The statute is void for vagueness because the term "exposed to" is not defined and is subject to expansive interpretation and the statute fails to require danger or a significant risk of harm. The broad term "exposed to" coupled with the failure to require danger violates due process because the statute (1) fails to give

notice to an ordinary person of the conduct that can be prosecuted under the child endangerment statute, and (2) fails to establish minimal standards for prosecution, thereby leaving the decision as to what can be prosecuted under the statute to police, prosecutors, judges, and juries.

In the context of this case, the child endangerment statute failed to give notice to Ms. Draper that nursing her infant at some unspecified time after using marijuana, or having marijuana or paraphernalia in the basement of her home, would subject her to prosecution for child endangerment. Additionally, the arbitrary manner in which the statute is enforced is demonstrated by this case; while many officers would not have pursued child endangerment charges in this case based on evidence that Ms. Draper nursed her child eleven days after using marijuana or where the four-month-old child had no contact with the marijuana or paraphernalia and the items were downstairs, away from the child's room, the officers in this case chose otherwise.

Because this statute is vague and cannot be saved by a limiting construction, it must be stricken. If this Court disagrees that this unconstitutional statute must be stricken and attempts to construe it to save it from its unconstitutional infirmities, the word "exposed to" must either be stricken or given a narrow construction and the statute must be read to include a requirement that the child was subjected to danger or a significant risk of harm.

Regardless of whether the statute is unconstitutional, the state failed to establish probable cause to believe that Ms. Draper committed the crime of child endangerment. The state failed to establish probable cause to believe that Ms. Draper nursed her child in close proximity to using marijuana and failed to introduce credible evidence that nursing a child would cause marijuana to pass to the infant or create danger or a significant risk of harm to the infant under the circumstances of this case. Additionally, although neither the magistrate nor the trial judge relied on the state's theory that Ms. Draper endangered her child because marijuana was in the basement and that theory is therefore not a proper basis for upholding the bindover, the state nevertheless failed to establish probable cause to believe Ms. Draper committed child endangerment under its drug exposure theory. The trial court's order upholding the bindover should therefore be reversed.

ARGUMENT

POINT I. THE CHILD ENDANGERMENT STATUTE IS VOID FOR VAGUENESS SINCE IT FAILS TO GIVE NOTICE THAT HAVING CONTRABAND IN THE HOME OR NURSING A CHILD VIOLATES THE STATUTE, AND BECAUSE IT ALLOWS ARBITRARY AND DISCRIMINATORY ENFORCEMENT.

The child endangerment statute is unconstitutionally vague since it fails to give notice that having marijuana and paraphernalia out of reach in a house where an infant resides or that nursing a child at some point after using marijuana is prohibited conduct under the statute, and also because the statute allows for arbitrary and discriminatory application. The language of the statute, including the use of the term "exposed to" and

the failure of the statute to require danger or a significant risk of harm results in a failure to provide notice that Ms. Draper's behavior could be prosecuted as child endangerment and also allows police officers, prosecutors, judges, and juries to decide what behavior is prohibited by the statute. Because the child endangerment statute is vague as applied in this case, it violates due process. See generally Green, 2004 UT 76, ¶44 (citing Vill. of Hoffman Estates, 455 U.S. at 495, n.7).

A. A STATUTE IS VOID FOR VAGUENESS WHEN IT FAILS TO GIVE NOTICE OF THE CONDUCT THAT IS PROHIBITED OR FAILS TO ESTABLISH MINIMAL GUIDELINES THEREBY ALLOWING ARBITRARY AND DISCRIMINATORY ENFORCEMENT.

Principals of procedural due process prohibit the application of a statute that is vague. Green, 2004 UT 76, ¶43. A penal statute is unconstitutionally vague when it fails to "'define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" Id. (quoting Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983)).

A statute is vague, in violation of due process, if it violates either the notice or arbitrary enforcement aspect of the doctrine. Green, 2004 UT 76, ¶43.

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates

> basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (footnotes omitted) (citations omitted). Courts have less tolerance for vague provisions that carry criminal penalties than they do for vagueness in civil statutes. Vill. of Hoffman Estates, 455 U.S. at 498-99; Green, 2004 UT 76, ¶43.

The notice aspect of the vagueness doctrine requires that a statute be invalidated when the statute "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits[.]" City of Chicago v. Morales, 527 U.S. 41, 56, 119 S.Ct. 1849, 1859, 144 L.Ed.2d 67, 80 (1999). The purpose of this aspect of the vagueness doctrine "is to enable the ordinary citizen to conform his or her conduct to the law." Id. at 58. A loitering statute that made it a crime to "remain in any one place with no apparent purpose "fail[ed] to give an ordinary citizen adequate notice of what is forbidden and what is permitted," and therefore violated this first aspect of the vagueness doctrine. Id. at 51, n.14, 57. A child endangerment statute that applied to a person who "[p]laces [a] dependent in a situation that may endanger his life or health," thereby allowing prosecution in circumstances where there was only a possibility of harm, also violated this first aspect of the vagueness doctrine because it failed to give notice to persons of ordinary intelligence of the conduct proscribed by the statute. State v. Downey, 476 N.E.2d 121, 123 (Ind. 1985).

Both aspects of the vagueness test are important and bear on whether the prohibitions of the statute are sufficiently defined so as to comply with due process. See Greenwood, 817 P.2d at 819 (quoting Kolender, 461 U.S. at 357). While the notice aspect of the vagueness doctrine is important, the vagueness requirement that the legislature establish minimal guidelines so as to protect against arbitrary enforcement is of even greater importance. See Kolender, 461 U.S. at 557-58.

> Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine -- the requirement that a legislature establish minimal guidelines to govern law enforcement." Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."

Id. This second aspect of the vagueness doctrine provides an "'independent reason' for deeming a criminal law void for vagueness when the challenged law authorizes arbitrary or discriminatory enforcement." United States v. Regan, 93 F. Supp. 2d 82, 87 (2000) (citing Morales, 527 U.S. at 56).

The second prong of the vagueness doctrine forbids the delegation of "basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications." Grayned, 408 U.S. at 109. In determining whether "'the broad sweep of the ordinance . . . violates' the requirement that a legislature establish minimal guidelines to govern law enforcement" (Regan, 93 F. Supp. 2d at 88 (citations omitted)), courts consider whether

the statute places objective limitations on those charged with enforcing the statute. Id. (citing *inter alia* Kolender, 461 U.S. at 358). Because allowing officers, prosecutors, judges, or juries to decide whether a law has been violated offends "notions of fairness and concerns about government conduct," due process is violated when a statute fails to establish minimal guidelines for enforcement and instead leaves that decision to others. Id. at 87-88.

> In this context, a court must consider whether the challenged law "necessarily entrusts lawmaking to the moment-to-moment judgement of the police man on his beat. [ ] The arbitrary or discriminatory enforcement prong derives from both notions of fairness and concerns about arbitrary government conduct -- both of which are as old as the Republic. The constitutional principle undergirding the Due Process Clause is that citizens should never be subjected to the whims of an unrestrained executive. Through the arbitrary or discriminatory enforcement prong of the vagueness challenge, an individual argues that because the particular law only vaguely defines the prohibited conduct, the relevant legislative or regulatory body has surrendered its lawmaking power to an executive official, thereby vesting complete discretion in that official. Thus, the age old threat of arbitrary government action is realized.

Id.

The procedural due process limitations against allowing police officers, juries or prosecutors to decide the reach of a statute are well recognized. See e.g. Morales, 527 U.S. at 60-63; Regan, 93 F. Supp. 2d at 88; Commonwealth v. Carter, 462 S.E.2d 582, 583 (Va. App. 1995). A loitering statute that does not contain guidelines for enforcement and instead "'provides absolute discretion to police officers to determine what activities constitute loitering'" violates this second aspect of the vagueness

doctrine. Morales, 527 U.S. at 61 (citations omitted). Likewise, a child endangerment statute that allows prosecution when there "may" be a possibility of risk of physical or moral harm to a child violates this second aspect of the vagueness doctrine since it allows law enforcement to decide what conduct may create the possibility of a risk of harm. Carter, 462 S.E.2d at 585.

The child endangerment statute at issue in Carter was vague because it failed to establish minimal guidelines for law enforcement, thereby leaving it to law enforcement to decide what conduct constituted child endangerment. Id. The language of the statute, which prohibited placing a child in a situation that "may" cause moral or physical harm, left law enforcement to decide, "guided by subjectivity and personal predilection," the conduct which falls within the statute. Id.

> By using the term "may," the legislature criminalizes any act which presents a "possibility" of physical or moral harm to a child. [ ].
>
> Thus, guided by subjectivity and personal predilection, police and prosecutors in this instance concluded that the factually diverse conduct of each defendant possibly endangered the life, health, or morals of minors then in their custody. This determination may have resulted from individual moral imperatives, unique perspectives on specific conduct, or defendants' mere status. [ ] Whatever the motivation and however well-intentioned, the vague and inclusive language clearly failed to adequately inform law enforcement of the precise conduct prohibited by *Code § 40.1-103*, thereby accommodating arbitrary and discriminatory enforcement.

Id. (citations and footnote omitted); see also Downey, 476 N.E.2d at 123 ("It cannot be left to juries, judges, and prosecutors" to decide how to apply a statute.).

Accordingly, when a statute fails to give notice as to the conduct it proscribes or fails to establish minimal guidelines for enforcement, it is unconstitutional in violation of due process. Under such circumstances, due process requires that the statute be stricken. See Morales, 527 U.S. at 56 ("[v]agueness may invalidate a law" either because the statute fails to give notice or because it does not establish minimal guidelines for enforcement).

B. UTAH'S CHILD ENDANGERMENT STATUTE ALLOWS EXPANSIVE PROSECUTION WITHOUT DEFINING "EXPOSED TO" AND WITHOUT CLARIFYING WHETHER DANGER OR A SIGNIFICANT RISK OF APPRECIABLE HARM IS REQUIRED.

Utah's child endangerment statute violates both aspects of the vagueness doctrine in that it fails to provide sufficient detail to give notice to a person of ordinary intelligence as to what conduct is prohibited by the statute and also fails to provide minimal guidelines for law enforcement, thereby allowing for arbitrary and discriminatory enforcement. The child endangerment statute, Utah Code Ann. § 76-5-112.5 (2003), states:

> **76-5-112.5. Endangerment of a child or elder adult.**
>
> (1) For purposes of this section:
>
> (a) "Chemical substance" means a substance intended to be used as a precursor in the manufacture of a controlled substance, or any other chemical intended to be used in the manufacture of a controlled substance. Intent under this subsection may be demonstrated by the substance's use, quantity, manner of storage, or proximity to other precursors, or to manufacturing equipment.
>
> (b) "Child" means the same as that term is defined in Subsection 76-5-109(1)(a).

(c) "Controlled substance" means the same as that term is defined in Section 58-37-2.

(d) "Drug paraphernalia" means the same as that term is defined in Section 58-37a-3.

(e) "Elder adult" means the same as that term is defined in Section 76-5-111.

(2) Unless a greater penalty is otherwise provided by law, any person who knowingly or intentionally causes or permits a child or elder adult to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia as defined in Subsection (1), is guilty of a felony of the third degree.

(3) Unless a greater penalty is otherwise provided by law, any person who violates Subsection (2), and a child or elder adult actually suffers bodily injury, substantial bodily injury, or serious bodily injury by exposure to, ingestion of, inhalation of, or contact with a controlled substance, chemical substance, or drug paraphernalia is guilty of a second degree felony unless the exposure, ingestion, inhalation, or contact results in the death of the child or elder adult, in which case the person is guilty of a felony of the first degree.

(4) (a) It is an affirmative defense to a violation of this section that the controlled substance was provided by lawful prescription for the child or elder adult, and that it was administered to the child or elder adult in accordance with the prescription instructions provided with the controlled substance.

(b) As used in this Subsection (4), "prescription" has the same definition as in Section 58-37-2.

Utah Code Ann. § 76-5-112.5 (2003).

In interpreting a statute, courts first consider the plain language of a statute. Travelers/Aetna Insurance Co. v. Wilson, 2002 UT App 221, ¶12, 51 P.3d 1288. When considering the plain language of a statute, courts "presume that the legislature used each word advisedly and give effect to each term according to its ordinary and accepted meaning." Arredondo v. Avis Rent A Car Sys., Inc., 2001 UT 29, ¶12, 24 P.3d 928 (citations omitted). Courts "'read the plain language of the statute as a whole, and

interpret its provisions in harmony with other statutes in the same chapter and related chapters.'" State v. Ireland, 2005 UT App 22, ¶8 (quoting Miller v. Weaver, 2003 UT 12, ¶17, 66 P.3d 592). Words in a statute that have a commonly accepted meaning should be given that common, lay meaning unless there is an indication that the legislature intended otherwise. Travelers/Aetna Ins. Co., 2002 UT App 221, ¶12.

When the language of the statute is not clear, courts look beyond the language of statute and utilize other methods of statutory construction. The focus in analyzing the statute remains, however, on effectuating the legislative intent. Where possible, a statute must be construed so as to avoid "constitutional infirmities." Intermountain Slurry Seal v. Labor Comm'n., 2002 UT App 164, ¶6, 48 P.3d 252 (citing In re Marriage of Gonzalez, 2000 UT 28, ¶23, 1 P.3d 1074 (citations and quotations omitted)).

> In construing a statute, our aim is to give effect to the legislature's intent in light of the purpose the statute was meant to achieve. When doubt or uncertainty exists as to the meaning or application of an act's provisions, an analysis of the act in its entirety should be undertaken and its provisions harmonized in accordance with legislative intent and purpose. One of the cardinal principles of statutory construction is that the courts will look to the reason, spirit, and sense of the legislation, as indicated by the entire context and subject matter of the statute dealing with the subject. Further, we have a duty to construe a statute whenever possible so as to effectuate the legislative intent and avoid and/or save it from constitutional conflict or infirmities.

Id. Moreover, while the title of a statute is ordinarily not considered part of its text, when the language of the statute is ambiguous, courts will consider the title in construing a statute. Estate of Stephens v. Bonneville Travel Inc., 935 P.2d 518, 521-22 (Utah 1997).

The language of Utah's child endangerment statute allows prosecution for exposure to controlled or chemical substances or paraphernalia without clarifying the meaning of "exposed to" and without requiring danger or a significant risk of harm. The meaning of the term "exposed to" is ambiguous in that it is not clear whether the child must have direct contact with or a connection to the contraband or whether just seeing the item is enough, and it is also not clear whether any actual danger or significant risk of harm is required in order to be "exposed to" contraband within the meaning of the statute. Because the language is ambiguous, legislative history and the title of the statute can be considered in determining the reach of the statute. See id.

Legislative history demonstrates that the legislature did not intend for the statute to be broadly applied to circumstances such as these where parents have marijuana and paraphernalia out of reach in their home where an infant resides, or when a mother breast feeds her baby at some point after using marijuana. Instead, the legislative history of the child endangerment statute demonstrates that the legislature intended to reach behavior that caused direct contact or connection between children or the elderly and controlled substances, chemical substances or paraphernalia, and which raised "significant risks of injury or even potential death to child, or to the elderly." Senate Bill 188, House Debates (February 29, 2000); see legislative history at R. 88-102 in Addendum D.

In passing the legislation in 2000, both houses focused on the danger to children and the elderly that arises when a person is operating a clandestine lab and producing

methamphetamine in a home where children or the elderly reside. Senate Bill 188, Senate Debates (February 22, 2000); House Debates (February 29, 2000); see Addendum D. In fact, the discussion in the House focused on methamphetamine labs, and in summation, Representative Cox reiterated that "[l]aw enforcement has been working very hard to clean up the meth labs in our communities" and the child endangerment statute provided them a better tool to do that. R. 94. The Senate likewise focused on the dangers to children and the elderly caused by the production of methamphetamine in their homes. R. 96. Legislative history therefore demonstrates that in passing the child endangerment statute in 2000, the legislature intended the statute to be applied when danger or a significant risk of harm is created by intentionally or knowingly permitting a child to have contact with or be impacted by a controlled or chemical substance or paraphernalia. See Utah Code Ann. § 76-5-112.5 (2000) in Addendum E.

The legislative history also shows that the 2002 amendments to the statute were not intended to change the reach of the statute so as to allow prosecution when there was not danger or a substantial risk of harm, and instead were aimed at correcting two "oversights" in the 2000 statute. Although the 2002 amendments removed the requirement that the defendant "knowingly or intentionally cause[] or permit[] a child or elder adult to be at risk of suffering bodily injury, substantial bodily injury, or serious bodily injury" that change was not intended to broaden the reach of the statute and instead was aimed at precluding the need for scientific evidence to establish the danger of

controlled substances. House Bill 125, House Debates (February 25, 2002); Senate Debates (March 5, 2002); R. 95, 99 in Addendum D. In addition, the legislature added an exception for prescription medication in 2002. Hence, the legislative intent in adopting and amending the child endangerment statute was to criminalize conduct that created danger or a significant risk of harm.

The title of the statute also demonstrates that the legislature intended that it proscribe conduct that endangers children or that causes a substantial risk of endangerment. While ingestion or inhalation of a controlled substance by a child may demonstrate a substantial risk of harm, without more, being "exposed to" a controlled or chemical substance or paraphernalia, when broadly defined, does not. In fact, in this case where the marijuana and paraphernalia were in the basement and Ms. Draper breast fed her baby at some point after using an unspecified amount of marijuana, a substantial risk of appreciable harm to the child did not exist.

Although the legislature focused primarily on clandestine methamphetamine production and the serious risks to children when methamphetamine is produced in their home, the statute contains far broader language that renders it unconstitutional.
By not requiring any danger or a substantial risk of harm and by not defining the term "exposed to," the child endangerment statute violates due process. While statutes are presumed to be constitutional, when a statute as applied to a defendant such as Ms. Draper fails to give notice or allows for arbitrary enforcement, that statute must be invalidated as

a violation of due process. See Morales, 527 U.S. at 56.

C. UTAH'S CHILD ENDANGERMENT STATUTE IS VOID FOR VAGUENESS BECAUSE IT FAILS TO GIVE NOTICE AS TO CONDUCT PROHIBITED UNDER THE STATUTE.

Utah's child endangerment statute fails to give notice to a person of ordinary intelligence regarding the nature of the conduct that is prohibited. As applied to the facts of this case, the statute fails to give notice that having marijuana and paraphernalia out of reach in a house where an infant lives would give rise to prosecution for child endangerment, or that nursing a child at some point after using an unspecified amount of marijuana would give rise to a charge. The failure of the statute to specify the limitations of the term "exposed to" and the ambiguity of that term in the context of the statute, along with the statute's failure to require danger or a significant risk of harm, demonstrates the lack of notice inherent in the statute. Because the statute fails to give the required notice, it is void for vagueness in violation of due process.

The term "exposed to" is not defined in the statute and provides unclear direction as to the behavior that might "expose" a child to a controlled substance, chemical substance or paraphernalia. While the statute makes it unlawful to intentionally allow a child to be exposed to a controlled substance or paraphernalia, it does not specify whether being "exposed to" requires some direct contact or whether being in the vicinity of the contraband without any connection is sufficient. Nor does the term "exposed to" specify whether the exposure must create danger or a significant risk of harm to the child.

The trial court relied on the following definition of the word "expose" found in Random House Webster's Dictionary in reaching its conclusion the word "expose" as used in the statute includes visual exposure of contraband to children. R. 122.

> 1.a. To remove shelter or protection from; b. To lay open, as to something undesirable or injurious. 2. To subject (*e.g.*, a photographic film) to the action of light. 3. To make visible . . . 4.a. To make known (*e.g.*, a crime); b. To reveal the guilt or wrongdoing of. 5. To abandon or put out without shelter or food.

R. 122, citing Random House Webster's Dictionary 250 (4th ed. 2001). Other dictionaries likewise contain multiple definitions for the word "expose." For example, Webster's New World Dictionary defines the word "expose" as follows:

> 1*a)* to lay open (to danger, attack, ridicule, etc.); leave unprotected *b)* to make accessible or subject (to an influence or action) 2 to put or leave out in an unprotected place, abandon [some ancient peoples *exposed* unwanted infants] 3 to allow to be seen; disclose; reveal; exhibit; display 4 *a)* to make (a crime, fraud, etc.) known; unmask *b)* to make known the crimes, etc. of 5 Photog. To subject (a sensitized film or plate) to radiation having a photochemical effect.

Webster's New World Dictionary, 4th ed. 501 (4th ed. 2003). These multiple definitions demonstrate that the word "expose" has many different meanings and applications and that the word does not have a commonly understood and accepted meaning because of the nuances in the use of the word. The trial court's conclusion that this term applied in its commonly understood meaning in the context of this statute was incorrect in light of these multiple definitions and the nuances in the use of the term.

The use of the word in the context of the statute raises additional ambiguities. The

statute requires that an adult allow a child "to be exposed to" a substance or paraphernalia; in other words, the language of the statute requires exposure of the child to the substance or paraphernalia and not that the substance or paraphernalia be exposed to the child. That wording suggests that the first definition of expose found in Webster's Dictionary, "to lay open (to danger, attack ridicule, etc.); leave unprotected or to make accessible or subject (to an influence or action)" is the definition applicable to the child endangerment statute. Pursuant to that definition, a child who is laid open to or subjected to danger from a controlled substance or paraphernalia has been "exposed to" an item within the meaning of the statute.

The use of the word "exposure" in subsection (3) is consistent with this definition and further demonstrates that the statute outlaws exposure of the child to the contraband and not the other way around. Subsection (3) enhances the penalty for violation of the statute when "a child . . . actually suffers bodily injury . . . *by exposure to* . . . a controlled substance . . . ." Utah Code Ann. § 76-5-112.5(3).

The trial court upheld the constitutionality of the child endangerment statute, concluding that the statute provided notice that having drugs in the basement constituted exposure under the statute and also that the statute gave notice that nursing a child after using marijuana allowed a child to be exposed to or to ingest marijuana, in violation of the statute. R. 165-66. Rather than considering the context in which the term "exposed to" is used in the statute, the trial court broadly defined the word "expose" as to "to lay

open"or "make visible," and concluded that since the contraband was visible and the infant was not protected from the items, "the child was exposed to them." R. 165.

The trial court's conclusion that the words "exposed to" encompass any items that are visible or in plain view to children emphasizes the ambiguity of the word as used in this statute. R. 122, 124. According to the trial court, any time contraband is in plain view, regardless of whether the child sees the item, the child is exposed to the item. R. 165. Even if there is no possibility of danger to the child, the adult can be prosecuted for allowing the contraband to be in plain view, according to the definition of "exposure" employed by the trial court. Allowing a child to be in the room when a television program depicts an actor using drugs, allowing a child to walk by a shop where a pipe is displayed in the window, or taking a child to a park where people are smoking marijuana would all amount to child endangerment under the trial court's definition of "exposure," regardless of whether the child saw the contraband or faced any danger.

In addition to the trial court's expansive reading of the statute to include visibility of the contraband, the broad dictionary definitions demonstrate that almost any action of permitting a child to be near a controlled or chemical substance or paraphernalia could arguably amount to exposure under the statute. For example, has a parent permitted a child to be exposed to paraphernalia if he takes the child into a store where cigarette rolling papers are sold? Under the broad dictionary definition of the word "expose," a child would be subjected to paraphernalia under these circumstances. Or, what if a parent

talks about a controlled substance or paraphernalia in front of a child? Discussing controlled substances in front of a child arguably subjects or exposes that child to a controlled substance. Moreover, since the statute outlaws exposure to chemical substances, under the trial court's interpretation and the broad definitions for "expose," strong cleaning products or paint thinner in a house could result in prosecution under this statute simply because the child was near the products.[2]

The statute fails to give fair notice of the conduct that it proscribes not only because the words "expose to" encompass a broad spectrum of actions, but also because the statute does not contain any language that limits the application of the statute to circumstances where the "exposure" or "ingestion" creates actual danger or at least a significant risk of harm to the child. See Downey, 476 N.E 2d at 123. In fact, the language of the statute is so broad that it does not require any connection between the child and the contraband and does not require any significant potential for harm. Accordingly, Utah's child endangerment statute did not provide fair notice to Ms. Draper that marijuana and paraphernalia in plain view in the basement or nursing her infant would subject her to prosecution for endangering that child.

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[2] The child endangerment statute defines "chemical substance" as "a precursor in the manufacture of controlled substance"; intent is demonstrated by the "substance's use, quantity, manner of storage, or proximity to other precursors or to manufacturing equipment." Utah Code Ann. § 76-5-112.5(1)(a) (2002). Under this definition, Drano stored in the same cupboard as a glass container or iodine, otherwise innocent behavior, could be prosecuted as child endangerment under the statute.

Like the loitering statute in Morales, Utah's child endangerment statute fails to give fair notice as to what acts it prohibits. In Morales, the Court concluded that the Illinois loitering statute did not give fair notice as to what loitering conduct was prohibited. See Morales, 527 U.S. at 57-60. Similarly, Utah's child endangerment statute fails the notice inquiry since it does not give notice to parents or others who are in the vicinity of children as to what acts in connection with controlled or chemical substances or paraphernalia will give rise to prosecution as child endangerment. In the context of this case, Utah's child endangerment statute failed to give notice that marijuana and paraphernalia in the basement of a home where an infant resides or nursing a child would give rise to a prosecution for child endangerment. Like the unconstitutional loitering statute in Morales, Utah's child endangerment statute violates the first aspect of the vagueness test because it does not provide a standard of conduct to which persons can conform their behavior in order to not be prosecuted for child endangerment. See id.

> The Constitution does not permit a legislature to "set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *United States v. Reese*, 92 U.S. 214, 221, 23 L.Ed. 563 (1876). This ordinance is therefore vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Coates v. Cincinnati,* 402 U.S. 611, 614, 29 L.Ed.2d 214, 91 S.Ct. 1686 (1971).

Morales, 527 U.S. at 60.

The decision in Downey, holding that the Indiana child endangerment statute failed to provide adequate notice as to what conduct it prohibited, further demonstrates that

Utah's child endangerment statute fails the first prong of the vagueness inquiry. See Downey, 476 N.E.2d at 123. The statute in Downey made it unlawful to place a dependent "in a situation that may endanger his life or health." Id. The court read the statute as "proscrib[ing] placements which to some degree are likely to bring a dependent into a situation in which he is exposed to harm." Id. Because the statute did not require that the conduct give rise to "a danger which is actual and appreciable," the court concluded that it left persons to guess as to what conduct "may" endanger a child, thereby violating due process. Id. Like the child endangerment statute at issue in Downey, the language of Utah's child endangerment statute is so broad that it does not require a substantial likelihood of harm to the child or contact between the child and the chemical or controlled substance or paraphernalia and does not therefore "indicate where the line is to be drawn between trivial and substantial things so that erratic arrests and convictions for trivial acts and omissions will not occur." Id.

Child endangerment statutes in other jurisdictions that have at least tied the defendant's actions to the creation of a possibility of risk of harm have nevertheless been considered unconstitutionally vague because "persons of common intelligence are left to guess about the statute's meaning." Id. By not requiring danger or even the possibility of harm to the child, Utah's statute fails to specify what type of impact or potential impact, if any, the controlled substances, chemical substances or paraphernalia must have on the child, and therefore offers even less clarity than the statute in Downey. This lack of

clarity is exacerbated by the inclusion of the broad term "exposed to." Accordingly, the statute failed to give Ms. Draper notice that drugs and paraphernalia in plain view in her basement would subject her to a child endangerment charge or that nursing her child at some point after using an unspecified amount of marijuana would subject her to prosecution for child endangerment in the absence of a showing that her child was endangered.

D. UTAH'S CHILD ENDANGERMENT STATUTE IS ALSO VOID FOR VAGUENESS BECAUSE IT FAILS TO ESTABLISH MINIMAL GUIDELINES AND IS THEREFORE SUBJECT TO ARBITRARY AND DISCRIMINATORY APPLICATION.

Additionally, even if Utah's child endangerment statute informed a person of ordinary intelligence that marijuana in the basement or nursing a child under the circumstances of this case could be prosecuted as child endangerment, the statute nevertheless is unconstitutionally vague because it fails to establish minimal guidelines and is subject to arbitrary and discriminatory enforcement. See Morales, 527 U.S. at 61. Just as the loitering statute in Morales "'provides absolute discretion to police officers to determine what activities constitute loitering,'" Utah's child endangerment statute leaves absolute discretion to police officers to determine what constitutes permitting a child "to be exposed to" controlled or chemical substances or paraphernalia and also complete discretion to determine whether actual danger is required. See id. (citations omitted).

The broad definition of the term "exposed to" and the failure of the statute to require that the child be exposed to danger or a serious risk of appreciable harm leaves the

enforcement of the statute to the "subjectivity and personal predilection" of officers, prosecutors, judges, and juries. See Carter, 462 S.E.2d at 585. As previously outlined, the term "exposed to" has multiple meanings which render the statute ambiguous, thereby allowing officers rather than the legislature to decide what actions amount to child endangerment under the statute. Moreover, since the statute does not require that a child be subjected to danger, officers, prosecutors, judges, and juries are left to decide whether a particular action amounts to exposure under the statute.

The decision in Carter, concluding that the child endangerment statute at issue in that case allowed arbitrary government action in violation of the second aspect of the vagueness doctrine, highlights the problems with Utah's statute. See Carter, 462 S.E.2d at 585. The child endangerment statute in Carter violated the second aspect of the vagueness doctrine because it allowed prosecution based on the *possibility* that the defendant's conduct may threaten the health or morals of a child. Id. This imprecise standard left the decision as to what conduct fit within the statute to the "subjectivity and personal predilection" of police and prosecutors who, based on "individual moral imperatives, unique perspectives on specific conduct, or defendants' mere status" (id.), could decide if the defendant's conduct fit within the child endangerment statute. The problem with this is that "[w]hatever the motivation and however well-intentioned," such an approach "'necessarily entrusts lawmaking to the moment to moment judgment of the policeman on his beat,'" resulting in arbitrary and discriminatory enforcement. Morales,

527 U.S. at 60 (quoting Kolender, 461 U.S. at 359); see also Carter, 462 S.E.2d at 585; Downey, 476 N.E.2d at 123.

Similarly, Utah's child endangerment statute leaves the determination as to what conduct constitutes permitting a child "to be exposed to" controlled substances, chemical substances or paraphernalia, as well as the determination of whether an actual danger is required to the discretion of officers and prosecutors. While many officers or prosecutors might have concluded marijuana in a basement or nursing an infant when there was no showing that the child was endangered would not give rise to child endangerment charges, the prosecutor in this case decided otherwise. The arbitrariness of charging child endangerment in this case is emphasized by the fact that the child was an infant and there was no evidence he had seen the items and the fact that there was no showing the child would ingest or be exposed to marijuana through nursing.

Utah's child endangerment statute also leaves to police and prosecutors the determination of whether danger or potential harm is required and, if so, what constitutes such danger or potential harm. While many police officers would require a closer nexus between the conduct and the impact on the children, whether that be actual harm or a substantial likelihood of appreciable harm, than that which occurred in this case, the statute fails to specify minimal requirements in this area. This failure of the statute to specify the nature of the danger or connection required between the contraband and the child further demonstrates the broad sweep of the statute and its susceptibility to arbitrary

and discriminatory enforcement. Utah's statute allows an even broader application than the unconstitutional child endangerment statute at issue in Carter since the Carter statute required that the proscribed conduct at least create possible harm to the child. See Carter, 462 S.E.2d at 585.

The trial court's decision in this case likewise emphasizes the standardless sweep of Utah's child endangerment statute and the concomitant arbitrariness of its application. The trial court recognized that the statute "reaches a broad spectrum of conduct to allow the fact finder to determine under the specific facts of the case whether a child or elder were 'exposed' to 'a controlled substance, chemical substance, or drug paraphernalia.'" R. 165. Contrary to the trial court's resolution, the broad, undefined sweep of the statute renders the statute unconstitutional precisely because it allows policemen, prosecutors, judges, and juries to decide what conduct constitutes exposure. Because Utah's child endangerment statute fails to establish minimal guidelines and entrusts lawmaking to officers and prosecutors, it fails the second prong of the vagueness doctrine and must be overturned as a violation of due process.

E. THE VAGUENESS OF UTAH'S CHILD ENDANGERMENT STATUTE REQUIRES THAT IT BE INVALIDATED.

When a statute is unconstitutionally vague and is "'not reasonably susceptible to a limiting construction,'" the statute must be invalidated. See Morales, 527 U.S. at 51 (citation omitted); see also In re I.M.L., 2002 UT 110, ¶25, 61 P.3d 1038 (invalidating statute based on its overbreadth where statute could not reasonably be construed to meet

due process requirements). While courts construe a statute in order "to 'effectuate the legislative intent' while avoiding interpretations that conflict with relevant constitutional mandates," (In re Matter of a Criminal Investigation, 754 P.2d 633, 640 (Utah 1988)), in doing so, a court cannot rewrite the statute. In re I.M.L., 2002 UT 110, ¶25. In attempting to construe a statute so as to meet constitutional requirements, courts are nevertheless limited "by reasonable canons of statutory construction." Id. A court cannot "'infer substantive terms into the text that are not already there. Rather, the interpretation must be based on the language used, and [the court has] no power to rewrite the statute to conform to an intention not expressed.'" Id. (citations omitted). Additionally, "[i]n considering the ordinary meaning of the terms of a statute, [courts] will not interpret the language so that it results in an application that is 'unreasonably confused, inoperable, [or] in blatant contradiction of the express purpose of the statute.'" Id. (citations omitted).

The vagueness of the child endangerment statute requires that it be invalidated since in order to construe the statute to meet constitutional requirements, this Court would have to rewrite the statute and such an interpretation would render the statute confusing and inoperable. Because the statute cannot be reasonably construed so as to give notice as to what is prohibited and to preclude arbitrary enforcement while also effectuating the legislative intent, it must be stricken.[3]

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[3] A facial challenge based on the statute's vagueness exists "if the statute is shown to be vague in all of its applications, beginning with its application to the facts at hand." Green, 2004 UT 76, ¶45 n.15, citing State v. MacGuire, 2004 UT 4, ¶12, 84 P.3d 1171.

F. ALTERNATIVELY, IF THIS COURT ATTEMPTS TO SAVE THE STATUTE FROM ITS CONSTITUTIONAL INFIRMITIES, THE INTERPRETATION MUST NARROW THE APPLICATION TO CIRCUMSTANCES WHERE DIRECT CONTACT OR CONNECTION BETWEEN THE CHILD AND THE CONTRABAND CREATES ACTUAL DANGER OR A SIGNIFICANT RISK OF HARM.

Although Appellant believes that the statute cannot be construed so as to save it from its constitutional infirmities, if this Court believes otherwise, to meet due process concerns, at the very least the words "exposed to" must be stricken or defined narrowly, and the statute as a whole must be read to require danger or a significant risk of harm to a child. Construed in this manner, the statute would retain some "residual vagueness" but would be closer to the type of statute mandated by due process. See Downey, 476 N.E.2d at 123 (recognizing that "residual vagueness" remained despite narrow construction of statute, but concluding that due process requirements were met under narrowed construction in light of concern for health and welfare of children).

First, the words "exposed to" must either be stricken because of the wide range of definitions available for that term, or narrowly limited to circumstances where there is contact between the child and controlled substance or the controlled substance has some physical impact on the child, and the contact or impact creates actual danger or a significant risk of danger to the child. See id. The term "exposed to" is found in a list of

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In this case where Utah's child endangerment statute is vague as applied, it is also vague on its face since it is unclear whether it requires actual danger and the words "exposed to" have limitless application.

actions that include "to ingest or inhale, or to have contact with." Utah Code Ann. § 76-5-112.5(2). It must therefore be read narrowly and in harmony with these surrounding terms. See Ireland, 2005 Ut App 22 at ¶11 (reading word "consumption" narrowly and in harmony with surrounding terms). The terms surrounding "exposed to" require a more significant impact than merely being in the vicinity of an item or seeing it. Instead, there must be an actual touching or entry into the body. The trial court's conclusion that contraband in plain view or nursing exposed the Draper infant to the contraband was therefore incorrect since the term "exposed to" must be interpreted in harmony with the surrounding terms. See id.

In addition, the title of the statute supports an interpretation requiring danger. Because the language of the statute is ambiguous, consideration of the title is appropriate. See Estate of Stephens, 935 P.2d at 521-22. The title of the statute, "Endangerment of a child or elder adult" demonstrates that the statute is aimed at circumstances where a child is actually endangered by the conduct.

Moreover, the legislative intent supports a narrow interpretation of the words "exposed to" and application of the statute only where the conduct creates actual danger or a significant risk of actual and appreciable harm. As set forth supra at 18-20, the legislature passed this statute to address the "significant risks of injury or even potential death to child, or to the elderly" that arise when a person is operating a clandestine drug lab around children or the elderly. R. 86, 96; see Addendum D. Although the statute was

amended in 2002 to limit the need for scientific evidence, the legislative intent to proscribe conduct that endangers children remained. Hence, legislative intent and the title of the statute support construing the words "exposed to" narrowly and requiring danger for the statute to apply.

The decision in Downey construing Indiana's child endangerment statute narrowly in order to save it from its constitutional infirmities provides guidance. Although the statute violated due process when construed literally because it subjected persons to prosecution based on the mere possibility that an action may endanger a child, the court concluded that a non-literal and narrow construction of the possibility of harm language could save the statute. Downey, 476 N.E.2d at 122-23. The court recognized that it could not "amend a statute or establish public policy within its judicial authority to confine legislative products to constitutional limits." Id. at 123. It could, however, "in reading a statute for constitutional testing, [ ] give it a narrowing construction to save it from nullification, where such construction does not establish a new or different policy basis and is consistent with legislative intent." Id. (citation omitted).

With those guidelines in mind, the Downey court construed Indiana's child endangerment statute as "as applying to situations that endanger the life or health of a dependent." Id. The court clarified that "[t]he placement must itself expose the dependent to danger which is actual and appreciable." Id. While acknowledging that this narrower construction of the statute had "residual vagueness," the court was willing to

accept that residual vagueness in light societal concerns regarding the health and safety of children. Id.; see also Carter, 462 S.E.2d at 585 (severing portion of child endangerment statute that was unconstitutionally vague because it allowed prosecution for the mere possibility of danger, and leaving remainder of statute in place).

Should this Court conclude that Utah's child endangerment statute can be construed to save it from constitutional infirmities, this Court should at the very least strike the term "exposed to" or narrowly construe that term and require that a person must permit a direct connection or contact between the child and contraband which creates actual danger or a significant risk of harm in order to be prosecuted for child endangerment.

POINT II. THE STATE FAILED TO ESTABLISH PROBABLE CAUSE TO SUPPORT A BINDOVER ON THE CHILD ENDANGERMENT CHARGE WHERE THE EVIDENCE FAILED TO ESTABLISH PROBABLE CAUSE TO BELIEVE THE INFANT INGESTED OR WAS EXPOSED TO MARIJUANA SO AS TO ENDANGER HIM.

The child endangerment charges should be dismissed not only because the statute is void for vagueness in violation of due process, but also because the state failed to establish probable cause to believe that Ms. Draper committed the crime of child endangerment. Regardless of whether the statute is given a broad interpretation or this Court attempts to narrow the statute in an effort to save it from its constitutional infirmities, the state failed to establish probable cause to believe Ms. Draper committed

the crime of child endangerment. Although the standard for bindover is low, the trial court erred in refusing to quash the bindover in this case.

A. EVEN IF THE STATUTE IS GIVEN UNLIMITED APPLICATION, THE STATE FAILED TO ESTABLISH PROBABLE CAUSE TO BELIEVE THAT MS. DRAPER INTENTIONALLY OR KNOWINGLY ALLOWED HER INFANT TO BE EXPOSED TO OR INGEST CONTROLLED SUBSTANCES.

Even if the term "exposed to" is given a broad definition, the state did not establish probable cause to believe that Ms. Draper intentionally or knowingly allowed her infant "to be exposed to" or ingest marijuana. While the magistrate concluded that the state failed to demonstrate probable cause to believe the baby was exposed to the marijuana in the basement, he concluded that probable cause for the bindover existed based on nursing the child. R. 66. Although in addressing the vagueness issue, the trial court referred to the child endangerment theory based on drugs being in plain view in the basement, it upheld the bindover based only on the nursing evidence. R. 165, 168. Because the state failed to establish probable cause to bind over Ms. Draper for trial based on its theory that by nursing her child, Ms. Draper allowed the child "to be exposed to" or "to ingest" marijuana, the bindover should be quashed.

"'[T]o bind a defendant over for trial, the State must show "probable cause" at a preliminary hearing by producing' evidence sufficient 'to support a reasonable belief that an offense has been committed and that the defendant committed it.'" State v. Bradshaw, 2004 UT App 298, ¶23, 99 P.3d 359 (cert. granted) (quoting Clark, 2001 UT 9, ¶¶10, 16

(citations omitted)). "This means that the State must produce 'believable evidence of all the elements of the crime charged.'" Bradshaw, 2004 UT App 298 at ¶23 (quoting Clark, 2001 UT 9 at ¶15). The probable cause standard at preliminary hearings is the same as the probable cause standard for arrest warrants. Clark, 2001 UT 9 at ¶16. Moreover, the evidence presented at the preliminary hearing must be viewed in the light most favorable to the prosecution for purposes of bindover. State v. Virgin, 2004 UT App 251, ¶11, 96 P.3d 379 (further citations omitted).

Although the magistrate cannot assess the credibility of the witnesses, a magistrate can and should "disregard [ ] facially incredible evidence." State v. Talbot, 972 P.2d 435, 438 (Utah 1998). In fact, disregarding incredible evidence is necessary if a preliminary hearing is to serve the purpose of "'ferreting out groundless and improvident prosecutions.'" Id. , citing State v. Anderson, 612 P.2d 778, 783-84 (Utah 1980). In this case, the evidence presented in the light most favorable to the state failed to establish probable cause to believe Ms. Draper committed the crime of child endangerment.

The marshaled evidence is as follows[4]:

1. Ms. Draper lived with her husband, another adult, and four-month-old son, D.D. R. 46, 52, 55, 57. D.D. was born on September 8, 2003. R. 57.

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[4] Although marshaling is not required since the magistrate did not make any findings as to demeanor or credibility of the witnesses and this Court "review[s] the magistrate's decision to bind over a defendant without deference," Ms. Draper nevertheless marshals the evidence for the convenience of the Court. See Virgin, 2004 UT App 251, ¶9, n.2.

2. Officers executed a search warrant on the home on January 9, 2004. R. 46. During the search, they found individually packaged marijuana, baggies, scales, money, a pay-owe sheet, a couple of bongs, and some pipes in a downstairs room. R. 48. Although the trial court determined that these items "lay open or were visible and the child was not protected from them," the state did not put on any evidence that the items were in plain view. R. 48; see also R. 44-62.

3. The marijuana and paraphernalia found downstairs belonged to Ms. Draper's husband, Jimmie Draper. R. 49-50, 52. Two bags tested positive for marijuana; one bag had 9.9 grams while the other bag had 8.7 grams. R. 50-51. Officers also found money in the bedroom Ms. Draper shared with her husband. R. 49.

4. After being Mirandized, Ms. Draper acknowledged that her husband had been selling marijuana for 1½ years. R. 49. She also told the officer that her husband left the house to make his sales and nothing was sold out of the house. R. 54.

5. Ms. Draper and her husband shared an upstairs bedroom. R. 53. Four-month-old D.D. had an upstairs bedroom. R. 53.

6. On January 20, 2004, an investigator with the Division of Child and Family Services, made an unannounced visit to Ms. Draper's home. R. 57. D.D. was present during the interview. R. 57. The purpose of the interview was to discuss allegations of child endangerment based on police finding marijuana in the home. R. 57.

7. During the January 20, 2004 visit, the investigator asked Ms. Draper whether she was "using or currently using" marijuana. R. 58. Ms. Draper told the investigator that she had used marijuana twice since D.D. was born, once on New Year's Eve and once on January 9, 2004 after the officers executed the warrant on her home. R. 58.

8. While the investigator was talking with Ms. Draper, Appellant began nursing D.D. R. 58. The investigator then talked to Ms. Draper "about the dangers of using and how marijuana and any other drugs go through breast milk to the child." R. 58. Ms. Draper told the investigator "that she did not know that the marijuana would go through the breast milk to the child" and that she would not use again. R. 60.

The magistrate concluded that the evidence supported bindover on the nursing theory of child endangerment based on his incorrect perception that the evidence showed that Ms. Draper stated that she nursed her child in close proximity to her use of marijuana. The magistrate stated:

> Now, I have evidence at this point that breast feeding will transmit the Marijuana, some substance from Marijuana through breast milk to the child if it is smoked. That is the evidence. I have evidence from Ms. Draper's statement that she smoked and then transmitted it to the child and I have her statement that she didn't know that, which may be true or maybe not, but it is certainly a self-serving statement under these circumstances. I am bound to interpret everything in favor of the State here to find all inferences in favor of the State and to assume that the State's case will get stronger. Now I don't know whether it will or not in this case and I will tell you this, it is a very shaky jury case at this point.

R. 66. The trial court on the other hand apparently focused on the January 20th nursing incident and upheld the bindover by speculating that since Ms. Draper nursed her infant

and was an admitted drug user, she must have used drugs prior to nursing. R. 168. The judge stated:

> As stated above, *supra* I.A., the Defendant was nursing her child and was an admitted drug user. A reasonable inference that the Defendant was using drugs prior to nursing her child can be made, therefore the "ingested" portion of the statute may apply. Although there was testimony that the Defendant did not know that the drugs in her system and would pass to her child when she was nursing, the evidence must be viewed in the light most favorable to the State and all reasonable inferences drawn in the State's favor. The Court concludes that there was enough evidence at the preliminary hearing to show the Defendant knowingly or intentionally caused her child to ingest or be exposed to a controlled substance, chemical substance or drug paraphernalia.

R. 168.

In order to bind over a defendant for trial on the charge of child endangerment, the state must present credible evidence establishing probable cause as to all elements of the crime. In other words, the state must establish through credible evidence probable cause to believe that Ms. Draper "knowingly or intentionally cause[d] or permit[ted] a child . . . to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia . . . ." Utah Code Ann. § 76-5-112.5(2). In this case where the Information alleges that the crime of child endangerment occurred on or about January 9, 2004, the state failed to establish probable cause to believe that on or about January 9, 2004, Ms. Draper nursed her child after consuming marijuana, and that the marijuana was transmitted to the child thereby causing the child to ingest or be exposed to the marijuana. Moreover, if this Court concludes that the child endangerment

statute requires danger or a significant risk of harm to the child, the state also failed to establish this element where there is not credible evidence showing that even if marijuana is transmitted in breast milk, it will endanger a child.

While the evidence shows that Ms. Draper admitted using marijuana on New Year's Eve and on January 9, 2004, it fails to show that she nursed her child at any time in close proximity to her use of marijuana. Although the magistrate thought Ms. Draper had made a statement "that she smoked and then transmitted it to her child" (R. 66) and that there was evidence that Ms. Draper smoked marijuana then nursed her child "within a relatively short time of that" (R. 67), the evidence actually shows only that Ms. Draper nursed her child on January 20, 2004 and stated that she used marijuana 11 days earlier as well as 21 days earlier, and does not show that she nursed the child in close proximity to her admitted marijuana use. R. 58. Because some mothers nurse their children intermittently and use bottles and other forms of sustenance for four month olds, it is mere speculation to assume how much time passed before Ms. Draper nursed her child after using marijuana on January 9th, other than that the evidence demonstrates she nursed her child eleven days later, on January 20th.

The trial court, perhaps sensing that the evidence did not show when the nursing that gave rise to crime occurred, apparently chose to focus on the proven fact of the January 20th nursing, then infer that Ms. Draper must have used marijuana prior to nursing rather than inferring that she nursed in close proximity to the January 9th use. R. 58.

Since there is no evidence that Ms. Draper used marijuana on any occasion other than the two dates she mentioned, the judge's speculation that she must have used drugs before the January 20th nursing is not supported by the evidence. In fact, there is no evidence that Ms. Draper was under the influence of marijuana or had used marijuana when she met with the DCFS investigator. Moreover, the judge's sweeping speculation that because Ms. Draper was an admitted drug user, she must have used drugs prior to nursing her child subjects Ms. Draper to the rejected label of "status criminal" and improperly makes her liable for nursing her child after using drugs at any time, without any showing that she used marijuana on the occasion in question. See State v. Ireland, 2005 UT App 22, ¶20, citing Robinson v. California, 370 U.S. 660, 666 (1962).

Regardless of whether this crime allegedly occurred on January 9th or January 20th, the evidence fails to establish probable cause to believe that Ms. Draper used marijuana in close proximity to nursing D.D. In fact, the evidence shows only that she nursed D.D. eleven days after using marijuana. If the crime date is January 9th, as alleged in the Information, the evidence shows that she nursed him on January 20th. On the other hand, if the date of the alleged crime is January 20th, the evidence shows only that she used marijuana eleven days earlier. The passage of eleven days between any established use and an act of nursing shows that the state did not establish probable cause to believe D.D. was exposed to or ingested marijuana.

In addition to failing to establish that Ms. Draper nursed D.D. in close proximity to her use of marijuana, the state failed to introduce credible evidence that marijuana used by Ms. Draper would pass to her child through breast feeding. The only evidence introduced by the state to support its claim that by nursing D.D. at some point after using marijuana, Ms. Draper caused D.D. to be exposed to or to ingest marijuana was the DCFS investigator's statement that she talked to Ms. Draper "about the dangers of using and how marijuana and other drugs go through the breast milk to the child." R. 58. As a preliminary matter, this testimony when read in context is simply anecdotal background information regarding the meeting between Ms. Draper and the investigator, relaying the information the investigator gave Ms. Draper. R. 58. The testimony is multiple hearsay which in context, was not presented to establish the truth of the matter asserted, i.e. that the marijuana would be transmitted through breast milk. Because the investigator's rendition of what she told Ms. Draper was multiple hearsay presented as background and not for the truth of the matter asserted, it is not credible evidence that marijuana can be transmitted to a nursing infant. See Talbot, 972 P.2d at 438 (magistrate must "disregard [ ] facially incredible evidence").

The investigator's explanation of her discussion with Ms. Draper of the transmission of drugs through breast milk is also not credible evidence that marijuana passes to an infant through breast feeding because it is not lay witness testimony that was rationally based on the investigator's perceptions. See Utah R. Evid. 701. Instead, the

testimony obviously required specialized knowledge and therefore qualified as expert testimony under Rule 702, Utah Rules of Evidence. See State v. Rothlisberger, 2004 UT App 226, 95 P.3d 1193 (trial court abused its discretion in allowing a witness to testify as a lay witness where the subject matter required specialized knowledge). The state presented no evidence suggesting that the investigator had any specialized knowledge or education in this area, and instead simply presented anecdotal hearsay evidence to support its claim that Ms. Draper exposed her son or allowed him to ingest marijuana by breast feeding him. Because the investigator's lay testimony based on multiple hearsay was not credible evidence that marijuana would pass to the infant, the magistrate was required to disregard it as part of his role in ferreting out improvident prosecutions. See Talbot, 972 P.2d at 438 (facially incredible evidence must be disregarded in making probable cause determination).

Additionally, even if this evidence were credible, the lack of evidence as to the proximity between Ms. Draper's use of marijuana and nursing, the amount of marijuana she used, or the time it takes for marijuana to not be found in breast milk show that the bindover fails. Had the state presented expert or otherwise credible evidence that marijuana can be passed to an infant through breast feeding, it nevertheless was required to establish that under the facts of this case, there was probable cause to believe marijuana passed through Ms. Draper's breast milk to D.D. The amount of marijuana Ms. Draper used, the way in which it was consumed, and the passage of time would necessarily

impact on this determination. For example, if Ms. Draper inhaled two puffs of marijuana and the next morning nursed her child, would there be detectable marijuana in her milk? The state's anecdotal and multiple hearsay evidence that was not presented for the truth of the matter asserted and instead to explain the conversation between the investigator and Ms. Draper failed to establish probable cause to believe that under the circumstances of this case, Ms. Draper allowed her child to be exposed to or ingest marijuana.

Moreover, assuming this Court interprets the child endangerment statute to require danger or a significant risk of harm to the child, the evidence presented in this case failed to establish that requirement. The state needed to put on credible evidence to establish probable cause to believe not only that the marijuana would have passed to the child under the circumstances of this case, but also that the impact of the marijuana created danger or a significant likelihood of appreciable harm. The state's failure to introduce any evidence regarding the impact on a baby who nurses at some point after the mother used marijuana required that the bindover be quashed.

While the standard for bindover is low, the state nevertheless is required to introduce credible evidence as to all of the elements of the crime. Clark, 2001 UT 9, ¶¶10, 15; Bradshaw, 2004 UT App 298, ¶23. "'[T]he magistrate's role in this process, while limited, is not that of a rubber stamp for the prosecution . . . . Even with this limited role, the magistrate must attempt to ensure that all "groundless and improvident prosecutions" are ferreted out no later than the preliminary hearing."'" Clark, 2001 UT 9

at ¶10 (citations omitted). In this case where the state's evidence that the marijuana would pass to the child was speculation and not admitted for the truth of the matter asserted, and the state failed to present credible evidence as to the proximity of the nursing to the admitted use of marijuana, the amount of marijuana used, the passage of marijuana through breast milk or the impact, if any, on an infant so as to give rise to danger or a significant risk of harm, the state failed to establish probable cause to believe Ms. Draper committed the crime of child endangerment.

B. ALTHOUGH THE CHILD ENDANGERMENT CHARGE WAS NOT BOUND OVER OR UPHELD UNDER THE STATE'S THEORY THAT THE CHILD WAS ENDANGERED BY DRUGS IN PLAIN VIEW, EVEN IF IT WERE, THE EVIDENCE FAILED TO ESTABLISH PROBABLE CAUSE UNDER THAT THEORY.

The state's nursing theory is the only arguable basis for upholding the bindover since the magistrate bound the case over solely on evidence supporting this theory and the trial court likewise relied solely on this theory in upholding the bindover. Nevertheless, even if this Court were to consider the state's argument below that drugs in the basement created probable cause, the evidence presented at the preliminary hearing failed to establish probable cause to believe Ms. Draper committed the crime of child endangerment based on marijuana and paraphernalia found in the basement.

Since the magistrate rejected the state's claim that marijuana found in the basement exposed the infant to marijuana and instead bound over the child endangerment charge only on the state's nursing theory, the marijuana in the basement theory could not be used

to uphold the bindover. See generally State v. Morgan, 2001 UT 87, 34 P.3d 767 (state cannot refile charges dismissed at preliminary hearing unless there is good cause shown or new evidence). The magistrate's refusal to bind over the case on the drug theory constituted a dismissal and could not later be resurrected as part of defendant's motion to quash the bindover on the nursing theory. See id. (allowing state to refile dismissed charges only if there is good cause or new evidence); Utah Code Ann. § 77-18a-1(2)(a) & (f) (2003) (providing state with the opportunity to appeal in circumstances where it believes a magistrate improperly refused to bind over a charge). In this case where the magistrate dismissed the state's plain view of drugs theory and the state did not appeal that decision or attempt to reinstate the charge on that basis pursuant to good cause or a showing of new evidence, the plain view of drugs theory was not a proper basis by which the trial court or this Court can uphold the bindover.

The trial court's reliance solely on the nursing theory for upholding the bindover also precludes the use of the state's plain view of marijuana theory for upholding the trial court's ruling. In its written materials, the state apparently recognized that the only proper basis for upholding the bindover would be a determination by the trial court that there was probable cause to bind over Ms. Draper for child endangerment based on the nursing theory because it relied on only this theory for upholding the bindover in its written memorandum. R. 126. While the state did attempt to orally argue that the trial court could uphold the bindover on the plain view of marijuana theory, the trial court apparently

rejected this argument since it upheld the bindover solely based on evidence that Ms. Draper had nursed her child at some point after using marijuana. R. 168. This alternative plain view of marijuana theory for upholding the bindover should therefore not be considered by this Court in determining whether there was probable cause to bind over Ms. Draper for the child endangerment charge.

Even if this Court were to consider the state's plain view of marijuana theory, the evidence fails to establish probable cause to believe the infant was exposed to the contraband in the basement. D.D. was four months old and therefore was not walking or moving around the house. His bedroom was upstairs, along with the bedroom of his parents. Officers found individually wrapped marijuana, baggies, scales, a pay-owe sheet, and paraphernalia in "[a] room downstairs in the basement." R. 48. Although the officer did not recall a door to the room, D.D. was not mobile and there is no evidence that he was in the room or saw the items. Under these circumstances, the state failed to establish probable cause to believe D.D. was exposed to the items. R. 66.

Additionally, although the state seemed to argue that the items were in plain view or visible (R. 65), the state presented no evidence establishing that the contraband was visible or in plain view. In fact, the state presented no evidence as to whether the items were in plain view or in a cabinet or whether they were out of reach or accessible. The only evidence the state presented was that contraband was found in a downstairs room. R. 48. Even under an expansive reading of the child endangerment statute to interpret

exposure to include contraband in plain view, the state failed to establish probable cause because there is no evidence these items were in plain view.

Moreover, assuming the statute requires danger or a substantial risk of harm, there is no evidence that D.D. was endangered in these circumstances. There is no evidence the items were in plain view or accessible to D.D. and no evidence that they created a risk to him. Accordingly, there was not probable cause to sustain a bindover for child endangerment on the state's theory that the infant was exposed to drugs in the basement.

CONCLUSION

Appellant/Defendant Becky Lynne Draper respectfully requests that this Court hold that Utah's child endangerment statute violates due process or, in the alternative, that the state failed to establish probable cause to support a charge of child endangerment, and remand the case with an order that the child endangerment charge be dismissed.

SUBMITTED this 15th day of March, 2005.

Joan C. Watt

JOAN C. WATT
SHANNON N. ROMERO
Attorneys for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that I have caused to be hand-delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, P. O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 15th day of March, 2005.

Joan C. Watt

JOAN C. WATT

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this _____ day of March, 2005.

_____

ADDENDA

ADDENDUM A

FILED

04 OCT -1 PM 12:03

THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
West Valley Department

THIRD DISTRICT COURT
WEST VALLEY DEPT.

THE STATE OF UTAH,

Plaintiff,

vs.

BECKY DRAPER,

Defendant.

MEMORANDUM DECISION
(Motion to Quash / Declare Utah Code § 76-5-112.5 Unconstitutional)

041100201

Case No. ~~041100233~~

Judge Terry L. Christiansen

The above matter came before the Court for oral argument on Becky Draper's (Defendant) motion to quash bindover / declare Utah Code § 76-5-112.5 unconstitutional on September 13, 2004. Lana Taylor appeared on behalf of the State of Utah and Shannon Romero appeared on behalf of the Defendant. The Court took the matter under advisement. Having reviewed the file and having researched the law pertaining to the issue, the Court DENIES the Defendant's motion to quash / declare Utah Code § 76-5-112.5 unconstitutional.

BACKGROUND

1 On January 9, 2004, Salt Lake County Detective John Wester (Wester) executed a search warrant at Defendant's residence, located at 9642 South Garnet Drive, Salt Lake County.

2 At the time Wester executed the warrant, the Defendant was present with her 4 month old child.

3 During execution of the warrant, Wester discovered individually packaged marijuana and packing material for marijuana distribution, *e.g.*, scales, money, a pay/owe sheet, bongs

and pipes. All of these items, except for the money, was found in the basement.

4 Defendant stated that her husband, Jimmy Draper, had been selling marijuana for about one and a half years.

5 The items tested positive for marijuana by the State Crime Lab.

6 Karen Barnes (Barnes), a child protective services investigator for the Division of Child and Family Services, received a referral concerning allegations of child endangerment.

7 Barnes made an unannounced visit to Defendant's residence on January 20, 2004. Defendant admitted to Barnes that she had smoked marijuana on New Years Eve and on the day Wester executed the search warrant.

8 While Barnes was interviewing the Defendant, the Defendant began breast feeding her child. At that point, Barnes discussed the dangers of using marijuana and how marijuana and any other drugs go through the breast milk to the child. The Defendant was not aware that marijuana remains in a person's system or that it would go through the breast milk to the child. The Defendant indicated that she would not use drugs anymore.

9 Barnes did not have the Defendant or the child tested for drugs.

10 On February 9, 2004, Defendant was charged with endangerment of child or elder adult, a third degree felony, in violation of Utah Code § 76-5-112.5.

11 On May 3, 2004, the Court bound over for trial concluding that there was sufficient evidence to find probable cause to believe that Defendant's child was endangered and that Defendant committed the crime.

12 Thereafter, the Defendant filed the present motion to quash / declare Utah Code § 76-5-112.5 unconstitutional challenging both (1) the constitutionality of the endangerment of

child or elder adult statute, § 76-5-112.5 and (2) the quantum of proof produced by the State at the preliminary hearing that the Defendant committed the crime of endangerment of a child.

I
VAGUENESS

In deciding the constitutionality of a statute, the court must first analyze the plain language of the statute. *State v. Macguire*, 2004 UT 4, ¶15, 84 P.3d 1171, 1175. "We need not look beyond the plain language unless we find some ambiguity in it." *Id.* at ¶15 (*citing Utah Sch. Bds. Ass'n v. State Bd. Of Educ.*, 2001 UT 2, ¶13, 17 P.3d 1125).

Section 76-5-112.5(2) provides:

> Unless a greater penalty is otherwise provided by law, any person who knowingly or intentionally causes or permits a child or elder adult to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia as defined in subsection (1), is guilty of a felony of the third degree.

"A constitutional challenge to a statute presents a question of law. . . . When addressing such a challenge, this court presumes that the statute is valid, and we resolve any reasonable doubts in favor of constitutionality." *State v. Morrison*, 2001 UT 73, ¶5, 31 P.3d 547. "Additionally, legislative enactments are presumed to be constitutional, and those who challenge a statute or ordinance as unconstitutional bear the burden of demonstrating its unconstitutionality." *State v. Green,* 2004 UT 76, ¶42 (Internal quotation marks omitted).

"[V]agueness questions are essentially procedural due process issues, i.e., whether the statute adequately notices the proscribed conduct." *Id.* at ¶43. Where a statute "implicates no constitutionally protected conduct, a court will uphold a facial vagueness challenge only if the

[statute] is impermissibly vague in all of its applications." *State v. Macguire*, *supra*, 2004 UT at ¶12 (*quoting Village of Hoffman Estate v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982).

> A statute that is clear as applied to a particular complainant cannot be considered impermissibly vague in all of its applications and thus will necessarily survive a facial vagueness challenge. . . . In order to establish that the complained of provisions are impermissibly vague, a defendant must demonstrate either (1) that the statutes do not provide the kind of notice that enables ordinary people to understand what conduct [is prohibited], or (2) that the statutes encourage arbitrary and discriminatory enforcement.

Id. at ¶13 (Citations omitted; internal quotation marks omitted); *see also State v. Green, supra,* 2004 UT at ¶43 .

"If a statute is sufficiently explicit to inform the ordinary reader what conduct is prohibited, it is not unconstitutionally vague." *Id.* at ¶14. "[A] defendant who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *State v. Ansari,* 2004 UT App. 326, ¶44 (Internal quotation marks omitted).

"[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts at hand. . . . Additionally, a court should examine the complainant's conduct before analyzing other hypothetical applications of the law when a challenged statute implicates no constitutionally protected conduct." *State v. Green, supra,* 2004 UT at ¶44 (Citations omitted, internal quotation marks omitted).

Utah courts have upheld statutes with undefined terms that were challenged as unconstitutionally vague. *See, e.g., State v. Owens*, 638 P.2d 1182, 1184 (Utah 1981)(*upheld* statute where "gross deviation" was undefined); *State v. Krueger*, 1999 UT App. 54, ¶14, 975 P.2d 489, 496 (Utah App. 1999)(*upheld* statute where "delinquent" was undefined); *Salt Lake City v. Lopez*, 935 P.2d 1259, 1265 (Utah App. 1997)(*upheld* statute where "emotional distress"

was undefined).

In *State v. Owens*, *supra*, the Utah Supreme Court concluded that the statute legitimately proscribed a broad spectrum of conduct and the undefined term had a common sense meaning. 638 P.2d at 1184.

In *State v. Krueger*, *supra*, the Court of Appeals of Utah relied upon the widespread usage of the terms "delinquency" and "contributing to the delinquency" of a minor to give clear and understandable meaning to those terms of the statute. *State v. Krueger*, *supra*, 1999 UT App. at ¶14. The Court of Appeals evaluated the connotation of those terms and whether such connotations were "sufficiently well known that persons of ordinary intelligence and judgment who desire to do so would have no difficulty in governing their conduct by the statute." *Id.* at ¶15.

In *Salt Lake City v. Lopez*, *supra*, the Court of Appeals of Utah relied upon the statute's specific intent requirement and stated that "a specific intent requirement significantly vitiates any claim that its purported vagueness could mislead a person of common intelligence into misunderstanding what is prohibited." *Salt Lake City v. Lopez*, *supra*, 935 P.2d at 1265. Moreover, the Court of Appeals examined the complainant's conduct before analyzing other hypothetical applications of the law to determine whether the statute was unconstitutionally applied to the defendant. *Id.* The Court of Appeals concluded that given the defendant's knowledge and conduct, he could not claim that the statute was vague as applied to him, "let alone that the statute is totally invalid and incapable of any valid application." *Id.*

When a term is undefined, the term's ordinary and accepted meaning is often taken from the dictionary. *See, e.g., Provo City v. Cannon*, 1999 UT App. 344, ¶13, 994 P.2d 206 (*defining*

"peril" with Webster's Dictionary); *State v. Serpente*, 768 P.2d 994, 996 (Utah App. 1989)(*defining* "expose" with Webster's Third New Int'l Dictionary).

A

Section 76-5-112.5(2) is presumed to be constitutional, therefore, Defendant bears a heavy burden of demonstrating its unconstitutionality. The Court concludes that Defendant fails to carry her heavy burden. Section 76-5-112.5(2) clearly gives notice that ordinary people of intelligence and judgment who desire to do so would have no difficulty in governing their conduct by the statute. Ordinary people of intelligence and judgment reading § 76-5-112.5(2) would understand that if a person knowingly or intentionally causes or permits a child or elder adult to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia they are guilty of a third degree felony.

There is no constitutional right to causing or permitting a child to be exposed to or have contact with a controlled substance, a chemical substance or drug paraphernalia, therefore, Defendant's facial vagueness challenge will succeed only if the statute is "impermissibly vague in all of its applications." *State v. Macguire, supra*, 2004 UT at ¶12.

The Defendant contends that the term "exposed" is undefined and therefore, does not provide a person of reasonable intelligence with enough detail to know what type of conduct is prohibited. The Defendant argues that there is no way of knowing what is meant by the term "exposed." The Court does not agree.

The term "exposed" needs no definition to be constitutional. By not defining the term "exposed" the legislature did not "impermissibly delegate basic policy matters to judges and juries for resolution on an ad hoc and subjective basis" as argued by the Defendant. Rather, the

legislature allows the fact finder to evaluate the facts of a case and apply the term "exposed" using the common sense or ordinary meaning of the term. "Expose" as defined by Webster's is:

> 1.a. To remove shelter or protection from; b. To lay open, as to something undesirable or injurious. 2. To subject (*e.g.*, a photographic film) to the action of light. 3. To make visible . . . 4.a. To make known (*e.g.*, a crime); b. To reveal the guilt or wrongdoing of. 5. To abandon or put out without shelter or food.

Random House Webster's dictionary at 250 (4th Ed. 2001); *see also* Webster's II: New Riverside University Dictionary at 452 (1988).

The statute legitimately reaches a broad spectrum of conduct to allow the fact finder to determine under the specific facts of the case whether the child or elder were "exposed" to "a controlled substance, chemical substance, or drug paraphernalia." There is no ambiguity in the statute and since the plain meaning of the statute is clear using the ordinary and accepted meaning of the term "exposed," the Court need not look to the legislative intent.

Under the facts of this case, the Defendant's residence had packaged marijuana, bongs, and pipes. Applying the common sense, ordinary and accepted meaning of the term "exposed," the marijuana, bongs and pipes lay open or were visible and the child was not protected from them, therefore, the child was "exposed" to the items. Moreover, the intent requirement that the Defendant "knowingly or intentionally" exposed the child significantly vitiates the impact of not defining the term "exposed" because a person of common intelligence would understand what is prohibited.

Furthermore, the Defendant was nursing her child and was an admitted drug user. An inference that the Defendant was using drugs prior to nursing her child is reasonable. Therefore, the "ingested" portion of the statute might apply because the Defendant was knowingly and intentionally breastfeeding her child, who was ingesting the drugs through the breastmilk.

As applied in this case, Section 76-5-112.5(2) is constitutional, therefore, the statute cannot be "impermissibly vague in all of its applications" as required to succeed on a vagueness challenge.

Defendant also argues that § 76-5-112.5(2) encourages arbitrary and discriminatory enforcement because there are not minimal guidelines or circumstances where "exposure" occurs to guide law enforcement and judges, therefore, they consciously or subconsciously discriminate against certain classes of individuals.

Although the Court need not address this challenge, because the Court previously decided that as applied in this case § 76-5-112.5(2) is constitutional, the Court clarifies that § 76-5-112.5(2) legitimately proscribes a broad spectrum of conduct. To attempt to define guidelines or circumstances would be arbitrary. *See, e.g., State v. Owens, supra*, 638 P 2d at 1184-85 As written, § 76-5-112.5(2) avoids arbitrarily narrowing the proscribed conduct and allows the fact finder to determine whether under the circumstances the child or elder person was "exposed" to "a controlled substance, chemical substance, or drug paraphernalia" applying the common sense, ordinary and accepted meaning of the term "exposed."

B

Defendant also argues that § 76-5-112.5(2) is unconstitutionally vague because the statute appears to criminalize potential harm rather than actual harm. Specifically, Defendant argues that the mere possibility or risk of "exposure" is sufficient to support the charge, which is unconstitutional and cites several non-binding cases The Court is not persuaded

Based upon the common sense or ordinary meaning of the term "exposed" as stated above, a person may decide under the circumstances whether the child or elder adult was

"exposed" to the prohibited items. The Court is not inclined to believe that the only harm is actual inhalation, ingesting or contact with because the Legislature did include the term "exposed," which under the general ordinary meaning of the word includes "to lay open," or "make visible," or "to remove shelter or protection from." These definitions are less than actual inhalation, ingestion or contact with, but are within the ordinary meaning of "exposed." Furthermore, just because a child or elder adult does not inhale, ingest or have contact with the prohibited items does not mean that they are not harmed.

II
PROBABLE CAUSE

Alternatively, the Defendant argues that the State failed to demonstrate probable cause to believe the Defendant committed the offense of child endangerment. The Court does not agree.

The "quantum of evidence necessary to support a bindover" is the same as that required for issuance of an arrest warrant: "[T]he prosecution must present sufficient evidence to support a reasonable belief that an offense has been committed and that the defendant committed it." *State v. Clark*, 2001 UT 9, ¶ 16. The Court outlined the magistrate's role, summarizing the conclusions of a number of prior cases:

> To bind a defendant over for trial, the State must show probable cause at a preliminary hearing by presenting sufficient evidence to establish that the crime charged has been committed and that the defendant has committed it. At this stage of the proceeding, the evidence required [to show probable cause] . . . is relatively low because the prosecution's case will only get stronger as the investigation continues. Accordingly, when faced with conflicting evidence, the magistrate may not sift or weigh the evidence . . . but must leave those tasks to the fact finder at trial. *Instead, the magistrate must view all evidence in a light most favorable to the prosecution and must draw all reasonable inferences in favor of the prosecution.* Yet, the magistrate's role in this process, while limited, is not that of a rubber stamp for the prosecution . . Even with this limited role, the magistrate must attempt to ensure that all groundless and improvident

prosecutions are ferreted out no later than the preliminary.

Id. at ¶ 10 (Citations omitted; internal quotation marks omitted, interpolation by the Court; emphasis added). The *Clark* court held "that to prevail at a preliminary hearing, the prosecution must still produce believable evidence of all the elements of the crime charged " *Id.* (Internal quotation marks omitted); *see also State v. Schroyer,* 44 P.3d 730, 732 (Utah 2002); *State v. Robinson*, 63 P.3d 105, 106 (Utah Ct. App. 2003).

Section 76-5-112.5(2) provides:

> Unless a greater penalty is otherwise provided by law, any person who knowingly or intentionally causes or permits a child or elder adult to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia as defined in subsection (1), is guilty of a felony of the third degree.

Viewing the facts in a light most favorable to the State and drawing all reasonable inferences in the State's favor, the Court concludes that the State met its burden to bindover to show a reasonable belief that an offense has been committed and that the defendant committed it. As stated above, *supra* I.A , the Defendant was nursing her child and was an admitted drug user. A reasonable inference that the Defendant was using drugs prior to nursing her child can be made, therefore, the "ingested" portion of the statute may apply. Although there was testimony that the Defendant did not know that the drugs in her system and would pass to her child when she was nursing, the evidence must be viewed in a light most favorable to the State and all reasonable inferences drawn in the State's favor. The Court concludes that there was enough evidence at the preliminary hearing to show that Defendant knowingly or intentionally caused her child to ingest or be exposed to a controlled substance, chemical substance or drug paraphernalia

The Court DENIES Defendant's motion to quash bindover / declare Utah Code § 76-5-112 5 unconstitutional

Dated this 30 day of September, 2004

TERRY L. CHRISTIANSEN
Third District Court Judge

ADDENDUM B

IN THE UTAH COURT OF APPEALS

----ooOoo----

Becky Draper, Petitioner and Defendant, v. State of Utah, Respondent and Plaintiff.	)	ORDER Case No. 20040879-CA

Before Judges Bench, Davis, and Orme.

This case is before the court on petitioner Becky Draper's petition for permission to appeal from an interlocutory order.

IT IS HEREBY ORDERED that the petition for permission to appeal is granted. The parties will be notified when a briefing schedule is established.

DATED this 4th day of November, 2004.

FOR THE COURT:

James Z. Davis, Judge

CERTIFICATE OF MAILING

I hereby certify that on November 4, 2004, a true and correct copy of the foregoing ORDER was hand-delivered to a personal representative of the Attorney General's Office and the Legal Defender's Office to be delivered to the parties listed below:

J. FREDERIC VOROS, JR.
ASSISTANT ATTORNEY GENERAL
160 E 300 S 6TH FL
PO BOX 140854
SALT LAKE CITY UT 84114-0854

SHANNON N. ROMERO
SALT LAKE LEGAL DEFENDER ASSOCIATION
424 E 500 S STE 300
SALT LAKE CITY UT 84111

and a true and correct copy of the foregoing ORDER was deposited in the United States mail to the trial court listed below:

THIRD DISTRICT, WEST VALLEY
ATTN: KAREN EELLS
3636 CONSTITUTION BLVD
WEST VALLEY CITY UT 84119

By _____
Deputy Clerk

Case No. 20040879-SC
THIRD DISTRICT, WEST VALLEY, 041100301

ADDENDUM C

AMENDMENT XIV

Section 1. [Citizenship — Due process of law — Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

76-5-112.5. Endangerment of child or elder adult.

(1) For purposes of this section:

(a) "Chemical substance" means a substance intended to be used as a precursor in the manufacture of a controlled substance, or any other chemical intended to be used in the manufacture of a controlled substance. Intent under this subsection may be demonstrated by the substance's use, quantity, manner of storage, or proximity to other precursors, or to manufacturing equipment.

(b) "Child" means the same as that term is defined in Subsection 76-5-109(1)(a).

(c) "Controlled substance" means the same as that term is defined in Section 58-37-2.

(d) "Drug paraphernalia" means the same as that term is defined in Section 58-37a-3.

(e) "Elder adult" means the same as that term is defined in Section 76-5-111.

(2) Unless a greater penalty is otherwise provided by law, any person who knowingly or intentionally causes or permits a child or elder adult to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia as defined in Subsection (1), is guilty of a felony of the third degree.

(3) Unless a greater penalty is otherwise provided by law, any person who violates Subsection (2), and a child or elder adult actually suffers bodily injury, substantial bodily injury, or serious bodily injury by exposure to, ingestion of, inhalation of, or contact with a controlled substance, chemical substance, or drug paraphernalia, is guilty of a felony of the second degree unless the exposure, ingestion, inhalation, or contact results in the death of the child or elder adult, in which case the person is guilty of a felony of the first degree.

(4) (a) It is an affirmative defense to a violation of this section that the controlled substance was provided by lawful prescription for the child or elder adult, and that it was administered to the child or elder adult in accordance with the prescription instructions provided with the controlled substance.

(b) As used in this Subsection (4), "prescription" has the same definition as in Section 58-37-2.

ADDENDUM D

SENATE BILL 188, HOUSE DEBATES (FEB 29, 2000)

MALE: Number 159 the 28 (inaudible) donated one day absence you'll (inaudible) dangerous.

FEMALE: Senate bill 188 potential for children and elderly Pete Swazzle (?) this was hurting law enforcement of criminal justice with a vote of eight yes, zero no, three absent.

MR. SPEAKER: (Inaudible) you are again.

MALE3: I would move to circle that place.

MR. SPEAKER: Motion to circle Senate Bill one, excuse me, (inaudible) Cox are you prepared to address this bill?

COX: I would withdraw my motion.

MR. SPEAKER: (Inaudible) to withdraw the motion representative. Okay the bill has been read in and we'll go to representative Cox for presentation of Senate Bill 188.

COX: Thank you Mr. Speaker Potan. I appreciate the opportunity to present this bill to you. What this basically does is changes the penalties re, related to operating a Clandestine uh, drug lab that presents significant risks of injury or even potential death to children, or to the elderly who might uh, be forced actually to live in those conditions. Uh, if this bill is passed it would be a third degree felony to recklessly or knowingly or intentionally cause or permit a child or an elderly person to suffer bodily injury from exposure to a controlled substance, a chemical substance or to drug paraphernalia. The

second degree felony if there were actually harm caused by the exposure to the illegal substances. Excuse me. It would be a first degree felony if that child or elderly person died because of the exposure. It's fairly simple in nature. It's uh, supported by the, the prosecutor's association, attorney general's office and uh, youth and family specialists that uh, work in this arena. I'm open for questions.

MR. SPEAKER: Discussion to the bill, representative Bush.

BUSH: May I question the sponsor?

MR. SPEAKER: Sponsor yield?

MALE: Yes.

MR. SPEAKER: Yes you may proceed.

BUSH: What's the, what's the definition of elderly?

MALE: The same, the same definition that is already in statute representative.

BUSH: What is it?

MALE: I don't know. Nobody wants to say either.

BUSH: Just don't, just don't do anything harmful to me.

MALE: It's line, it's line 52 in the uh, in the bill. Elder adult means the same as that term defined in Section 76-5-111. I don't have that opened right now.

MR. SPEAKER: To the bill, representative Dillary?

DILLARY: Uh yes my question is there's no fiscal note on the bill and under

normal circumstances when we increase uh, penalties or enhance uh, bring on a new felony or something this would involve incarceration and there would be a, a financial impact.

MALE: We (inaudible)

MR. SPEAKER: Did you want him to yield the question?

DILLARY: Yes,

MR. SPEAKER: Okay.

DILLARY: I want him to address why there isn't one.

MR. SPEAKER: (Inaudible) Cox will you yield?

COX: Yes.

MR. SPEAKER: Yes, go ahead.

COX: Thank you. Fiscal analysts indicated this could be done with in current budgets.

DILLARY: That's a first.

MR. SPEAKER: Thank you representative Wright to the bill.

WRIGHT: Thank you would sponsor yield?

MALE: I'll try.

WRIGHT: Representative Cox

MR. SPEAKER: (inaudible) you may proceed.

WRIGHT: You say we enhance the penalties, what, what were they previously

and what are the enhancing to?

COX: ...Anywhere from uh, misdemeanors to third degree felonies.

WRIGHT: Previously to now so this, this makes all these third degree felonies and what, what's the difference I guess.

COX: No. The difference now is that if the bi, if the individual creates that um, that condition, that and they do that recklessly, knowingly or intentionally, uh cause or permit a child or an elderly person to suffer bodily injury from exposure to those substances, be a second degree felony if there was actual harm caused. If death resulted as, as a result of that condition then it's a first degree felony.

WRIGHT: So what would be the penalty for just having a drug lab now?

COX: It's just a misdemeanor for just having a uh, lab.

WRIGHT: So it still would be a misdemeanor except we just, uh, and I su, I support you know what we're trying to do but I'm wondering why, why don't we just raise the penalties for having the drug lab in the first place. What, what you did was actually if you had bodily harm, so you have to prove some type of bodily harm and then it enhances the penalty rather then

COX: If, if there's, if there's actual cause of injury or death it enhances the penalty, yes.

WRIGHT: The question I would have is this a good way, why don't we just raise the penalty for a drug lab? You know maybe I'm a little naive for having it in the

first place, whether we

MALE: I, I think that's another bill that uh, representative uh, Tyler has worked on quite a bit.

WRIGHT: Okay. Thank you.

MR. SPEAKER: Thank you for the discussions representative Dayton.

DAYTON: Thank you Mr. Speaker, will sponsor yield?

MR. SPEAKER: Will the sponsor yield?

MALE: Absolutely.

MR. SPEAKER Yes you may proceed.

DAYTON: I, I'd like to pursue the questions that representative Wright had only because um, somewhere between child and elderly, um there are a lot of people that don't know about meth labs or even the danger that's involved in them and I'm uh, presuming the way the bill is written is if a child or an elderly person wouldn't be able to remove themselves from a situation, but, but a lot of people wouldn't, wouldn't know to. Until it was too late, um, I'm, I'm just confused about that, would you ad, address that concern?

MALE: These are, these are the people that are vulnerable that generally don't have the choice, they're, they either don't have a choice because they're too young or they're frightened, not able to leave, uh, their own children will be cre, creating the hazard in their home and they're concerned about being able to have anywhere else to go, um, because they have nowhere else to go.

DAYTON: Thank you.

MR. SPEAKER: For the discussion of the bill representative CURTIS.

CURTIS: Thank you Mr. Speaker, I would like to reserve the right to make a motion.

MR. SPEAKER: You made (inaudible) and reserve that right.

CURTIS: Thank you Mr. Speaker and will the sponsor yield to a question?

MR. SPEAKER: Do you yield representative Cox?

COX: Reluctantly.

MR. SPEAKER: You may proceed.

CURTIS: Um, it appears that in the a committee that, well it appears that the original intent of the bill was to go after intentional cont, con, conduct, um and the committee knowing or intentional conduct, the committee edited the criminal copeability standard of reckless, recklessly exposing somebody. Could you help me understand, what, why uh, they were going in that direction?

MALE: I think that's consistent with other, with language in other crimes. That they recklessly, knowingly or intentionally, that, that's consistent with the criminal code you're quite aware of that.

CURTIS: Well it's not consistent, representatives, if Mr. Speaker if I could place my motion to amend.

MR. SPEAKER: You may proceed.

CURTIS: On the golden rod copy line 53, I would simply move to delete recklessly, and if I may speak to that.

MR. SPEAKER: You may, uh, let me repeat that, on, on the golden rod copy line 53 we delete the word recklessly.

CURTIS: Yes.

MR. SPEAKER: Okay you may proceed with explanation.

CURTIS: Thank you uh, Mr. Speaker. Representatives in the criminal code there's a, there's a chapter entitled Chapter 2 which is principles of criminal responsibility and then copeability is defined and you have a generally four standards of criminal copeability. You have an intentional, a knowingly, a reckless or with criminal negligence. And what we've done here in this bill is we've elevated the penalties, and we've taken three of the four criminal standards of copeability. I think if somebody intentionally or knowingly exposes somebody to these chemicals that they should have some elevated principles, elevated copeability, but a reckless exposure to then say we're going to elevate it, not every crime is as a reckless crime. When representative Cox says well, I, I am familiar with the criminal code and that's why you have different levels of, you have homicide, and you have manslaughter, and you have negligent homicide and you have different levels based upon the copeability, but we've lumped all the copeability together and elevated the penalties. I'm asking to take that one level of copeability off and a reckless standard saying we did an intentional and knowingly and

uncomfortable with elevating the standard. But I'm not comfortable in elevating the penalty if we're going to lower the standards to.

MR. SPEAKER: Representative Cox response to motion to amend?

COX: Thank you Mr. Speaker Protam. I'd resist the motion, uh, this was recommended by the prosecutors. You got to recognize that when these individuals that have created this situation, this dangerous, dangerous situation, oft times they are under the influence of the drug themselves and what they do they do recklessly. We need to hold them copeable. We need to hold them accountable for that. And it should be at a higher level because of the danger that they're placing these small children and these elderly adults in. It's worthy of an elevated penalty. And I'd resist the motion on that.

MR. SPEAKER: Further discussion to the motion to amend. Seeing none, representative Curtis for summation on your motion.

CURTIS: Thank you Mr. Speaker. I agree with representative Cox, it's worthy of an elevated penalty. It's not worthy of a lower standard of copeability. There's a distinction and there's a difference and when you as, and when you go in to do establish how somebody did something if you're driving negligently and you kill somebody that's different then if you intentionally kill somebody. What we're doing is we're lumping all the standards of copeability together to get an elevated penalty. And I (tape went out). Thank you.

MR. SPEAKER: We'll place the motion to amend. The amendment is on the

golden rod copy line 53 we delete the word recklessly. All in favor of the motion to amend say I.

GROUP: I

MR. SPEAKER: Opposed no.

GROUP: No.

MR. SPEAKER: Sheriff rules, the motion carries. Five or more standing? Five or more standing be in division. Voting is open. ... Having voted we'll close the vote. Voting will be closed. Motion to Amend having received 39 yes notes and 24 no votes passes. Good ears as usual. Further discussion to the bill. Seeing none, representative Cox for summation on the bill.

COX: Thank you Mr. Speaker Potan. Law enforcement has been working very hard to clean up the meth labs in our communities. This provides them with the opportunity, a better tool to do that, to be better enforcers of the laws that we as a body have enacted. Uh, I'd appreciate your positive vote on this bill.

MR. SPEAKER: Thank you, voting is open on Senate Bill 188. ... Seeing all present having voted we'll close the vote. Senate Bill 188 having received 67 yes votes and 0 no votes will be returned to the senate for further action. Representative Norris Stevens.

HOUSE BILL 125, HOUSE DEBATES (FEB 25, 2002)

FEMALE: House Bill 125 endangerment of child or elder person with controlled substance or precursor Trisha Beck. This was heard in judiciary with a vote of

9 yes and 0 no 4 absent.

MR. SPEAKER: Representative Beck.

BECK: Thank you Mr. Speaker. Um, actually there were two oversights either section dealing with endangerment of a child or an elder adult and this bill merely corrects those oversights from the problems. The first problem is that the section contains an all court proof requirement. It's obviously intended to cover the situation where a person knowingly and intentionally gives a child or elder adult a controlled substance and there by exposes him of or her to injury. This section should have simply made it illegal to expose them to a non-prescribed controlled substance. Obviously they have already determined that the controlled substances are risky to an individual's health, otherwise they would not be a controlled substance. The same is true with the drug paraphernalia and chemicals used to making illegal drugs. The current language unintentionally requires the prosecutor to present scientific evidence to show that the controlled substances are dangerous. That's not only expensive but it's also ridiculous to spend all their time trying to show that. The other oversight in this section is that it contains no exceptions for drugs which are administered in accordance with the prescription from a (inaudible) physician. This bill also fixes that problem as it says in the last two paragraphs. So this also um, passed through the committee, um on it as a consensus bill, as on, it passed through the committee unanimously. So with that, that I'm open for any questions.

MR. SPEAKER: Discussion to House Bill 125. See no lights. Uh, voting is open on House Bill 125. ... Sorry about that. Representative Beck waives summation. It's obviously getting late. ... Seeing all present, representative Murray, representative Addaire, Senurey, Senior, Senate Bowman, I think the time's getting near, representative Hanson, seeing all present and having voted Senate Bowman. Voting will be closed. House Bill 125 having received 71 yes votes 0 no votes passes this body and referred to the Senate for further consideration. Madam Reading Clerk.

SENATE BILL 188, SENATE DEBATES (FEB 22, 2000)

MALE: Senate Bill 188

FEMALE: Senate Bill 188 protection for children and elderly, Senator Swazzle.

MALE: Senator Swazzle.

SWAZZLE: And thank you Ms. President, uh this bill uh, as we discussed yesterday addresses a very serious issue and that is the production of methamphetamines. This bill would uh, put in place a series of penalties for those clandestine drug operators as they manufacture these uh, illegal drugs and would put in place a penalty of a third degree if they knowingly or intentionally cause or permit a child or elder to suffer bodily injury. Second degree felony if they actually are harmed and a first degree felony if that child or elder actually dies as a result of those illegal substances.

MALE: Questions for Senator Swazzle. (Inaudible) questions being called. Senate Bill 188 pass roll call.

FEMALE: (inaudible) Ellett

ELLETT: I

FEMALE: Blackham,

BLACKHAM I

FEMALE: Davis. .. Demetris

DEMETRIS: I

FEMALE: Bev Evans ... Bart Evans

BART EVANS: I

FEMALE· Vel

VEL: I

FEMALE: Callowell

CALLOWELL: I

FEMALE: Villiard

VILLIARD: I

FEMALE: Al

AL: I

FEMALE: Holt

HOLT: I

FEMALE: Jones

JONES: I

FEMALE: Julander ... Knutsen

KNUTSEN: I

FEMALE: Densel ... Maine

MAINE: I

FEMALE: Montgomery

MONTGOMERY: I

FEMALE: Nielstein

NIELSTEIN: I

FEMALE: Nielsen

NIELSEN: I

FEMALE: Peterson

PETERSON: I

FEMALE: Knowlton

KNOWLTON: I

FEMALE: Stanford ... Steele

STEELE: I

FEMALE: Stevenson

STEVENSON: I

FEMALE: Swazzle

SWAZZLE: I

FEMALE: Valentine

VALENTINE: I

FEMALE: Waddit

WADDIT: I

FEMALE: (inaudible) Bailey

BAILEY: I

MALE: Senate Bill 188 has 27 I votes, no nay votes two being absent. Passes to the third reading count. Excuse me, passes to the house for their consideration. Next bill sub

House Bill 125, Senate Debates (March 5, 2002)

MR. PRESIDENT: (inaudible) House Bill 125.

FEMALE: House Bill 125 endangerment of child or elder person with controlled substance or precursor representative Beck, Senator Julander.

MR PRESIDENT: Senator Julander.

JULANDER: Thank you Mr. President, we've had uh, several discussions on this bill and we're trying to correct two oversights that had been in the uh, code um, to the present. The first problem was, was the awkward proof of requirement and we solved that yesterday with Senator uh, Valentines amendment, uh and um, the other was the um, the section that contains no exemption for drugs which are, are administered in accordance with the prescription from a physician. So unless there are any questions.

MR. PRESIDENT: Any questions for Senator Julander on this bill? ... See non Senator.

JULANDER: (inaudible) with the question that uh,

MR PRESIDENT: Question is should House Bill 125 pass? Roll call vote.

FEMALE: Senator Allen .. Ron Allen

ALLEN: I

FEMALE: Blancum .. (inaudible)

MALE: I

FEMALE: Brothers

BROTHERS: I

FEMALE: Davis

DAVIS: I

FEMALE: Demitrige

DEMITRIGE: I

FEMALE: Eastman

EASTMAN: I

FEMALE: Ericks

ERICKS: I

FEMALE: Gregra

GREGRA: I

FEMALE: Hale ... Halerow

HALEROW: I

FEMALE: Hickman ...Hillyard

HILLYARD: I

FEMALE: Jokums

JOKUMA: I

FEMALE: Julander

JULANDER: I

FEMALE: Knudson

KNUDSON: I

FEMALE: Maine

MAINE: I

FEMALE: Peterson

PETERSON: I

FEMALE: Polton

POLTON: I

FEMALE: Spencer

SPENCER: I

FEMALE: Steele

STEELE: I

FEMALE: Stevenson

STEVENSON: I

FEMALE: Swazzle

SWAZZLE: I

FEMALE: Valentine

VALENTINE: I

FEMALE: Claudertz

CLAUDERTZ: I

FEMALE: Walker

WALKER: I

FEMALE Wright

WRIGHT: I

FEMALE: (inaudible)

MALE: I

MR. PRESIDENT: House Bill 125 is received 26 I votes no nay votes three being absent, passes. Will be referred back to the House for further consideration as it was amended. We'll now go to

ADDENDUM E

*** ARCHIVE DATA ***

*** STATUTES CURRENT THROUGH THE 2000 GENERAL SESSION ***
*** ANNOTATIONS THROUGH 2000 UT 86 AND 2000 UT APP 291 ***

TITLE 76. UTAH CRIMINAL CODE
CHAPTER 5. OFFENSES AGAINST THE PERSON
PART 1. ASSAULT AND RELATED OFFENSES

Utah Code Ann. § 76-5-112.5 (2000)

§ 76-5-112.5. Endangerment of child or elder adult

(1) For purposes of this section:

(a) "chemical substance" means a substance used as a precursor in the manufacture of a controlled substance, or any other chemical, as demonstrated by its use, quantity, manner of storage, or proximity to other precursors, or to manufacturing equipment which was intended to be used in the manufacture of controlled substances;

(b) "child" means the same as that term is defined in Subsection 76-5-109(1)(a);

(c) "controlled substance" means the same as that term is defined in Section 58-37-2;

(d) "drug paraphernalia" means the same as that term is defined in Section 58-37a-3; and

(e) "elder adult" means the same as that term is defined in Section 76-5-111.

(2) Unless a greater penalty is otherwise provided by law, any person who knowingly or intentionally causes or permits a child or elder adult to be at risk of suffering bodily injury, substantial bodily injury, or serious bodily injury from exposure to, ingestion of, inhalation of, or contact with a controlled substance, chemical substance, or drug paraphernalia as defined in Subsection (1), is guilty of a felony of the third degree.

(3) Unless a greater penalty is otherwise provided by law, any person who violates Subsection (2), and a child or elder adult actually suffers bodily injury, substantial bodily injury, or serious bodily injury by exposure to, ingestion of, inhalation of, or contact with a controlled substance, chemical substance, or drug paraphernalia, is guilty of a felony of the second degree unless the exposure, ingestion, inhalation, or contact results in the death of the child or elder adult, in which case the person is guilty of a felony of the first degree.

HISTORY: C. 1953, 76-5-112.5, enacted by L. 2000, ch. 187, § 2.

NOTES:
EFFECTIVE DATES --Laws 2000, ch. 187 became effective on May 1, 2000, pursuant to Utah Const., Art. VI, Sec. 25.

COLLATERAL REFERENCES

A.L.R. --Prosecution of mother for prenatal substance abuse based on endangerment of or delivery of controlled substance to child, *70 A L R 5th 461*